S. HRG. 114–80

# OVERSIGHT OF LITIGATION AT EPA AND FWS: IMPACTS ON THE U.S. ECONOMY, STATES, LOCAL COMMUNITIES AND THE ENVIRONMENT

## HEARING

BEFORE THE

SUBCOMMITTEE ON SUPERFUND, WASTE MANAGEMENT, AND REGULATORY OVERSIGHT

OF THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

AUGUST 4, 2015

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# C O N T E N T S

# OVERSIGHT OF LITIGATION AT EPA AND FWS: IMPACTS ON THE U.S. ECONOMY, STATES, LOCAL COMMUNITIES AND THE ENVIRONMENT

**TUESDAY, AUGUST 4, 2015**

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON SUPERFUND, WASTE MANAGEMENT, AND REGULATORY OVERSIGHT,
*Washington, DC.*

The Subcommittee met, pursuant to notice, at 9:34 a.m. in room 406, Dirksen Senate Building, Hon. Mike Rounds (chairman of the Subcommittee) presiding.

Present: Senators Rounds, Markey, Inhofe, Boozman, Wicker, and Sullivan.

## OPENING STATEMENT OF HON. MIKE ROUNDS, U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA

Senator ROUNDS. The Subcommittee on Superfund, Waste Management and Regulatory Oversight is meeting today to conduct a hearing on oversight of litigation at EPW and Fish and Wildlife Service, impacts on the United States economy, States, local communities and the environment.

Today we are meeting to hear testimony on the impact environmental litigation has on the economy, States and communities. Both the Clean Air Act and the Endangered Species Act contain provisions allowing for citizens to file a citizen suit against a regulatory agency to assure an agency's compliance with Federal statutes.

While originally well intentioned, these citizen suits are being used to perpetuate what is often referred to as a sue-and-settle process that overwhelms regulatory agencies, resulting in settlement agreements and consent decrees requiring agencies to promulgate major regulations within an arbitrarily imposed timeline. These agreements are often negotiated behind closed doors with little or no transparency or public input.

Although the ultimate parties responsible for the regulations are the States and regulated entities, they have been nearly completely cut out of the process and are not consulted about the practical effects of the settlement agreement. Public comments from the States and industries regarding the feasibility or impact of these regulations are routinely ignored.

Further, these citizen suits allow nongovernmental organizations, or NGOs, and the Administration to advance their own policy agenda while circumventing the entire legislative process and Congress. As a result, major regulations that cost billions of dollars, stifle economic growth and inhibit job creation are being made by unelected bureaucrats in Washington who think they know what is best for everyone.

Under the Clean Air Act, citizen suits have been used to impose major regulations without any input from Congress and have little to no input from States. A study by the U.S. Chamber of Congress found that EPA considered reconsideration of the 2008 Ozone National Ambient Air Quality Standards could cost up to $90 billion annually to comply with, making it the most expensive regulation in history.

Further, States have been so entirely shut out of the process that their opposition is rarely given serious consideration. When the EPA promulgated sulfur dioxide regulations, every single State that commented about the regulation voiced its opposition. Rather than working with the States to address their concerns, the EPA ignored their comments and moved forward with the regulation.

Additionally, the Fish and Wildlife Service is in the middle of potentially listing more than 250 species as endangered or threatened on the Endangered Species List. Called one of the largest Federal land grabs in modern times, this is the result of a mega-settlement between the Fish and Wildlife Service and the NGOs that intentionally overwhelmed the agency with listing petitions simply so that they could sue the Fish and Wildlife Service for failing to meet statutory deadlines.

Because the Fish and Wildlife Service is now bound to court-imposed deadlines to make those listing decisions, the agency is rarely inclined to engage States, industries and landowners in real conservation efforts. As a result, these listings exemplify heavy handed Federal regulation rather than serious collaborative efforts to conserve and recover species.

The impact of these lawsuits is being especially felt in South Dakota where our only coal plant, the Big Stone plant, is in the midst of a $400 million upgrade to comply with EPA's Regional Haze rule. This project is not even completed yet and now this plant may not even be able to operate at all in order to comply with the Administration's Clean Power Plan. The sue-and-settle process has resulted in regulations that stifle innovation and hurt the future of this country by crushing the can-do American spirit that founded our Nation, settled the West, won two World Wars and put a man on the Moon.

I would like to thank our witnesses for being here with us today. I look forward to hearing your testimony. Now I would like to recognize my friend Senator Markey for a 5-minute opening statement.

Senator Markey.

[The prepared statement of Senator Rounds follows:]

STATEMENT OF HON. MIKE ROUNDS,
U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA

The Environment and Public Works Subcommittee on Superfund, Waste Management, and Regulatory Oversight is meeting today to conduct a hearing on "Over-

sight of Litigation at EPW and Fish and Wildlife Service: Impacts on the U.S. Economy, States, Local Communities and the Environment."

Today, we are meeting to hear testimony on the impact environmental litigation has on the economy, States and communities. Both the Clean Air Act and the Endangered Species Act contain provisions allowing for citizens to file a "citizen suit" against a regulatory agency to assure an agency's compliance with Federal statutes.

While originally well-intentioned, these citizen suits are being used to perpetuate what is often referred to as a "sue and settle" process that overwhelms regulatory agencies, resulting in settlement agreements and consent decrees requiring agencies to promulgate major regulations within an arbitrarily imposed timeline. These agreements are often negotiated behind closed doors, with little to no transparency or public input. Although the ultimate parties responsible for the regulations are the States and regulated entities, they have been nearly completely cut out of the process and are not consulted about the practical effects of the settlement agreement. Public comments from the States and industries regarding the feasibility or impact of these regulations are routinely ignored.

Further, these citizen suits allow Non-Government Organizations—or NGOs—and the Administration to advance their own policy agenda while circumventing the entire legislative process and Congress. As a result, major regulations that cost billions of dollars, stifle economic growth and inhibit job creation are being made by unelected bureaucrats in Washington who think that they know what is best for everyone.

Under the Clean Air Act, citizen suits have been used to impose major regulations without any input from Congress and little to no input from the States. A study by the U.S. Chamber of Congress found that EPA reconsideration of the 2008 Ozone National Ambient Air Quality Standards could cost up to $90 billion annually to comply with—making it the most expensive regulation in history. Also, the utility MACT rules cost an estimated $12.6 billion in compliance costs, and the regional haze implementation rule cost approximately $2.16 billion to comply. These exorbitant compliance costs result in the closure of U.S. power plants and the loss of U.S. jobs, while the benefits they bring about are questionable.

Further, States have been so entirely shut out of the process that their opposition is rarely given serious consideration. When the EPA promulgated sulfur dioxide regulations, every single State that commented about the regulation voiced its opposition. But rather than working with the States to address their concerns, the EPA ignored their comments and moved forward with the regulation.

Additionally, the Fish and Wildlife Services is in the middle of potentially listing more than 250 species as endangered or threatened on the Endangered Species List. Called one of the largest Federal land grabs in modern times, this is the result of a mega-settlement between the Fish and Wildlife Service and NGOs that intentionally overwhelmed the agency with listing petitions simply so they could sue the Fish and Wildlife Service for failing to meet statutory deadlines. Because the Fish and Wildlife Service is now bound to court imposed deadlines to make these listing decisions, the agency is rarely inclined to engage States, industries and landowners in real conservation efforts. As a result, these listings exemplify heavy-handed Federal regulation rather than serious collaborative efforts to conserve and recover species.

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The "sue and settle" process has resulted in regulations that stifle innovation and hurt the future of this country by crushing the can-do American spirit that founded our Nation, settled the West, won two World Wars and put a man on the Moon.

I'd like to thank our witnesses for being with us here today, and I look forward to hearing your testimony.

## OPENING STATEMENT OF HON. EDWARD J. MARKEY, U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator MARKEY. Thank you, Mr. Chairman, very much.

Today our Subcommittee hearing focuses on the effects of litigation on the Environmental Protection Agency and the Fish and Wildlife Service.

Litigation has always shaped public health and our environment. For example, in 1989 when the EPA tried to ban asbestos under

the Toxic Substances Control Act, industry sued and ultimately won, effectively rendering the entire law nearly impossible for the EPA to use.

Recently the Supreme Court told the EPA it has to take another look at the cost estimates of its Mercury Air Toxic rule after industries in 20 States sued. Even before yesterday's Clean Power Plan rules were announced, 14 States and Murray Energy Corporation tried to game the legal system by filing a premature legal challenge to them.

If we are going to look at the impact of litigation then we have to look at all participants. In one corner we have multi-billion dollar corporations suing to stall or stop environmental protections from taking effect. They are putting profits above clean air and water. In another corner, we have members of the public using the statutory rights that Congress gave them to hold agencies accountable and help ensure environmental goals are met.

For more than four decades, citizens sued provisions which are included in many environmental laws, like the Clean Air Act and Endangered Species Act have served as an essential oversight function. Citizen suits provide a mechanism for the public to ensure that agencies meet statutory deadlines and do what Congress has told them to do. The ability to recover reasonable cost and attorney's fees ensures that the little guy can take on the government and deep pocket industries when the law and the public interest have been violated.

Citizen petitions and lawsuits also help to protect the environment. For example, not one species would have been listed under the Endangered Species Act during the Bush administration without citizen petitions. EPA's deadlines to reduce air pollution in national parks and wilderness were amiss for so many years after EPA first issued the rules in 1999 that litigation brought by environmental groups in 2011 was needed to hold both the States and the EPA accountable.

EPA's Clean Air Act deadlines to control and reduce mercury emissions and other toxic pollutants from coal power plants were supposed to be met by 2002, but implementation of these regulations remains in litigation. Now some critics say these types of lawsuits are only brought by environmental organizations and that they lead to collusion between environmental groups and the agencies.

But a look at the facts shows this is not the case. According to GAO citizen suits have not had an important effect on environmental rulemaking. Moreover, during a 16-year period almost half of the lawsuits against the EPA were brought by industry trade associations and private companies, not environmental groups. For example, the petroleum industry sued the EPA in 2013 over its renewable fuel standard and subsequently, happily settled that lawsuit.

Some critics also say that citizen suits let the public or environmental groups dictate agency policy. But safeguards at the Department of Justice and the courts themselves prevent that from happening. A good case and point relates to the lawsuit filed by industry and the State of Alaska against the Clinton administration's 2001 Roadless Rule which was designed to protect national forest

from logging, mining and road building. The Bush administration's 2003 settlement exempted millions of acres of land in Alaska from the rule and effectively rolled back the regulation.

Ironically, this case prompted the first use of the phrase sue-and-settle. Just last week the court issued its final conclusion that the Bush administration had violated the law by changing its policy about whether the Tongass Forest needs protection from logging in the legal settlement instead of changing the regulation itself.

I look forward to your testimony today. We appreciate all of the witnesses being here today, and we thank you, Mr. Chairman, for holding this hearing.

Senator ROUNDS. Thank you.

Senator INHOFE. Mr. Chairman, may I make one comment? Four of the five Republicans are also on the Armed Services, which are meeting at the same time. So you are going to have some people going back and forth here including the four of us.

Senator ROUNDS. Thank you, sir. Senator Wicker, at this time I think you would like introduce our first witness.

Senator WICKER. Thank you, Mr. Chairman and Mr. Ranking Member. I am one of those members of the Armed Services Committee, so we are juggling hearings this morning. But thank you, Mr. Chairman, for holding this important hearing on the sue-and-settle practice and for allowing me to say a word or two about a distinguished member of our panel of witnesses today. I am glad to welcome my fellow Mississippian, Dallas Baker who is Air Director and Chief of Air Division of the Mississippi Department of Environmental Quality.

There are two reasons why Dallas is an outstanding witness for us today. First of all, he served the DEQ as an Environmental Engineer and has done so for some 20 years. He has been a tremendous asset to the State of Mississippi. In this capacity, he has worked closely with Federal agencies, local governments, and members of industry to navigate the permitting process and enhance DEQ's ability to serve citizens and companies in Mississippi.

There is another role that makes him an outstanding witness today and that is that he serves as president of the Air and Waste Management Association. This gives a full understanding of the regulatory role played by a State agency. So I look forward to hearing his insights, and I hope other members of this Subcommittee can benefit from his insights on the different nature of the sue-and-settle regulation and the impact this practice has on States, local communities and the environment. Mr. Baker is a graduate of the University of Mississippi and a distinguished public servant, and thank you for allowing me to welcome him on behalf of the full committee and the State of Mississippi.

Thank you, sir.

Senator ROUNDS. Thank you, Senator Wicker. Our other witnesses joining us for today's hearing are Kathleen Sgamma, Vice President of Government and Public Affairs, Western Energy Alliance; Andrew M. Grossman, Associate, BakerHostetler LLP, Adjunct Scholar, Cato Institute; Mr. Alfredo Gomez, Director, Natural Resources and Environment, Government Accountability Office; and Justin Pidot, Associate Professor, University of Denver Sturm College of Law.

Now we will turn to our first witness, Mr. Dallas Baker, for 5 minutes. Mr. Baker, you may begin.

**STATEMENT OF DALLAS BAKER, AIR DIRECTOR AND CHIEF OF AIR DIVISION, MISSISSIPPI DEPARTMENT OF ENVIRONMENTAL QUALITY; NATIONAL PRESIDENT, AIR AND WASTE MANAGEMENT ASSOCIATION**

Mr. BAKER. Thank you, Senator Rounds and Senator Markey, for the invitation to be with you today.

As Air Director of my State's environmental agency, I am responsible for maintaining clean air and the welfare of people back home. As of today, every air monitor we operate in Mississippi indicates we have clean air. This was no accident. Over the years, good planning, good air control technology and until recently good rulemaking played a part.

My testimony today is meant to shed light on recent process changes but also to express my concerns of unintended consequences of the so-called sue-and-settle approach.

In the past, we had ample time to participate in early rulemaking that reduced air emissions while minimizing the burden on the State and the private sector. Before a final rule was signed, the private sector had a chance to look at the main elements of the rule and in some cases had a seat at the table in the rulemaking process itself. They saw what was coming and they got prepared.

We had a time to schedule listening sessions and provide comments back to EPA. We heard what would work and what would not work. In the past, I felt the EPA sufficiently considered our comments and was responsive, which I felt strengthened the final product. I am concerned by the recent shift in this dynamic between EPA and the States.

The sue-and-settle method by definition keeps a State out of deliberations, yet it subjects us to the burden of reacting to it, whatever it is. Adding to the frustration and the details in methods used to arrive at the settlement are often sealed by the courts.

One recent example of such a settlement is the Sulfur Dioxide Consent Decree. Back in March, the DEQ received a letter from EPA indicating a settlement agreement was reached between EPA, the Sierra Club, and the Natural Defense Council. The consent decree said the EPA failed to complete designations of containment status with the 2010 1-hour average $SO_2$ standard.

The letter identified a power plant operated by the South Mississippi Electric Power Association or SMEPA called the R.D. Morrow Generating Plant in Lamar County. The Morrow Plant was identified based on a mission threshhold set in the agreement. Lamar County is now in jeopardy of being designated as non-obtainment for $SO_2$. Our only acceptable option of preventing this was to model the emissions as Plant Morrow and submit a recommendation of obtainment by the decree deadline of September 18, 2015. SMEPA agreed to finance the modeling process which remains on going. Last week we got in early model results and as expected, Lamar County appears to be in attainment for the $SO_2$ standard.

The end result of the EPA sue-and-settle in this case was an expenditure of already stretched resources of the State and no environmental benefit.

What is alarming to me was how quickly we had to react. In the $SO_2$ example affected States were provided only 6 months to make its recommendations. It took tremendous time and coordination to work it up to this point, and we still have work to do.

Now remember, if SMEPA had not agreed to absorb the cost and fast track modeling we likely would have had to accept a non-attainment designation for Lamar County. That would have led to efforts of redesignation and more importantly work to remedy the economic impact even a temporary non-obtainment designation would place on the Lamar County area.

So I am concerned of the presumed guilt here, meaning the area was presumed not in attainment simply by omission of one site. In the SEMPA case, DEQ believed Lamar to be in compliance with the standard and purely based on just experience. We operate two monitors located in that part of the State and much more industrial and more commercial areas than rural Lamar County. Those other monitors currently read well below the standard and in Lamar there is not much else there. We know Plant Morrow emissions; we did not believe the standards were at risk.

The settlement also limits our abilities to plan and designate resources. Beyond it, EPA seems to have chosen more and more stringent posturing being less flexible to the States. We are asked to do more with less in less time.

So good science, good technology and sufficient resource planning, an affective regulation development takes time. So appropriations and funding are scarce, new regulations such as the Clean Power Plan and the 2008 ozone modification are causing tremendous amounts of attention of our staff and we are limited and we are underfunded and over stretched.

We feel that our planning is being disrupted perhaps by these. Our concern is that this would continue in practice and it makes it very difficult for the State and private sector as well as the agency itself to do proper planning.

Thank you for your time and the invitation.

[The prepared statement of Mr. Baker follows:]

United States Senate
Environment and Public Works Committee
Subcommittee on Superfund, Waste Management, and Regulatory Oversight

Hearing: "Oversight of Litigation at EPA and FWS: Impacts on the U.S. Economy, States, Local Communities and the Environment"

Dallas Baker, Air Director, Mississippi Department of Environmental Quality
August 4, 2015

Thank you Senator Wicker, Senator Rounds and Senator Markey for the invitation to be with you today. As Air Director of my state's environmental agency, I am responsible for maintaining compliance of National Ambient Air Quality Standards and the welfare of people back home. As of today, every air monitor we operate in Mississippi indicates Design Values in compliance with these national standards, and is indicative of good planning, application of air control technology and, until recently, responsible rule making involving state officials and industry.

I want to share with you today how reasonable and transparent policy development has generally been successful in improving air quality in this country over the last three decades, but also my concerns of unintended consequences of the so-called "sue and settle" approach. In the past, impacted stakeholders, including my agency, were afforded ample time to participate in early rulemaking that ultimately reduced air emissions while minimizing the burden on the state and its companies. In general, as the final rule was ultimately signed, the industry that rule regulated had been afforded, at minimum, an advanced overview of the main elements, and in some cases a seat at the table in the rule development process itself. The states had sufficient time to engage industry, study the proposed rule, and to schedule listening sessions and provide our comments to EPA. We perceived EPA to sufficiently consider and address our comments in past rulemaking, which I feel strengthened the implementation process.

The "sue and settle" method by definition does not afford my state any input into the agreement, yet subjects us to the burden of satisfying the requirements of the agreement. Adding to the

frustration, the details and methodology used to arrive at the technical elements related to the settlement is often sealed by the courts. One recent example of such a settlement is the Sulfur Dioxide Consent Decree.

On March 20, 2015, the Mississippi Department of Environmental Quality (MDEQ) received a letter from EPA indicating that on March 2 a settlement agreement known as the $SO_2$ Consent Decree was reached between EPA, the Sierra Club and the Natural Defense Council. The Consent Decree addressed litigation concerning EPA's failure to complete designations regarding attainment status with the 2010 one-hour average $SO_2$ National Ambient Air Quality Standard (NAAQS). The notification to MDEQ identified South Mississippi Electric Power Association's (SMEPA) R. D. Morrow Generating Plant in Lamar County, Mississippi,, based on emission thresholds established in the closed agreement, in jeopardy of being designated as nonattainment. The state's only acceptable option of preventing the nonattainment designation was to model the $SO_2$ emissions at R. D. Morrow and submit a recommendation of attainment by the Consent Decree deadline of September 18, 2015. MDEQ is in the midst of this effort, and preliminary model results, as expected, reveal Lamar County to be in attainment with the $SO_2$ NAAQS. The end result of EPA's "sue and settle" in this case will be the expenditure of already stretched and valuable resources for both the state and SMEPA with no environmental benefit.

The cycle of "sue and settle" begins with faulty timelines. We understand in some cases the timeline dictated to EPA is out of its control; however, it is to those instances EPA is establishing the timelines that I wish to draw your attention. In the $SO_2$ Consent Decree example, states were provided only six months from notification of the agreement to make its recommendations based upon an in-depth air modelling exercise and analysis. In our case, MDEQ does not have the in-house capability to handle this type of modeling. The six month timeframe hardly provided adequate time for MDEQ to establish the contract, much less perform the work necessary to assist in running the model. The short timeframe also limits a state's ability to anticipate and budget its resources. If SMEPA had not agreed to absorb the cost and utilize its modeling contractors, the state would have been relegated to accepting the unnecessary nonattainment designation for Lamar County. In such an instance MDEQ would then begin to move forward with the much more intensive effort of re-designation and more importantly, work to remedy the

negative economic impact even a temporary nonattainment designation would place on the Lamar County area. Even beyond the "sue and settle" we see EPA, where given the discretion t establish timing, chooses to be more and more stringent and less flexible. State environmental agencies and specifically MDEQ are being asked to do more with less. Good science, sufficient resource planning, and effective regulation and policy development take time.

Another disconcerting issue we have with "sue and settle" and the $SO_2$ Consent Decree in particular is the posture of presumed "guilt" for the identified areas – meaning the area is presumed not in attainment based simply on a single site's sulfur dioxide emissions. In addition only modeling data is allowed to justify otherwise because monitoring didn't pre-exist. In the SMEPA case, MDEQ believes Lamar County to be in compliance empirically and based on experience. MDEQ currently operates two $SO_2$ NAAQS monitors located in much more industrial and commercial areas than rural Lamar County. These monitors currently read well below the standard. MDEQ does not believe it is a stretch to use a comparative analysis along with an understanding of SMEPA's control strategies and actual emissions to conclude that Lamar County would be in attainment Preliminary modeling results now support this. Due to the closed nature of the agreement made through "sue and settle," MDEQ is not provided the basis for which Lamar County was found to be presumed in violation of the NAAQS. Without state involvement or at least an open process regarding "sue and settle" agreements, we believe states will continuously find themselves defending unsubstantiated claims of rules and standards violations, further directing value time and resources away from programs that prove effective in protecting human health.

In addition, EPA at its discretion often makes decisions that seem arbitrary, not science-based.

Designations for the 1997 Ozone standard were made in 2004. EPA originally proposed to include DeSoto County, Mississippi, in the Memphis Ozone Non-Attainment Area. MDEQ submitted a robust technical support document supporting designating DeSoto County as in attainment. Monitoring data was well within the 1997 ozone standard and the county had a much smaller population and traffic density than other counties in the Memphis urbanized area. In the months prior to the designation, there was constant dialogue between MDEQ and EPA,

and there were several times when EPA requested clarification on some points of MDEQ's technical support document. MDEQ was given ample opportunity to answer EPA's questions regarding separating DeSoto County form the Memphis Non-Attainment Area. EPA's final decision was to designate DeSoto County as attainment and separated it from the Memphis Ozone Non-Attainment Area. MDEQ agreed with this decision and applauded EPA for the clarity of EPA's decision-making process and open communication in this action and felt this created a favorable precedent.

For the 2008 ozone standard, final designations were made in 2012. Again, EPA's proposal was to include DeSoto County in the Memphis Ozone Non-Attainment Area. MDEQ submitted a new and more vigorous technical support document recommending a designation of attainment for DeSoto County. After the submission of the technical support document, MDEQ contacted the EPA regional office several times asking if any further information or clarification would be helpful. Each of these attempts for open communication was declined. MDEQ was told final decisions were being made at the headquarters level without input from the regional office. Even though the data from the air quality monitor in DeSoto County was well within the 2008 ozone standard and the county still had a much smaller population and traffic density than other counties in the Memphis urbanized area, EPA ignored the prior precedent and included DeSoto County in the Memphis Ozone Non-Attainment Area. Additionally, when EPA released comments to MDEQ's technical support document, EPA gave little or no response to most of MDEQ's significant points, stating "EPA disagrees" without providing any significant basis for its decision.

To conclude, I recommend future litigation resulting in agreements the EPA makes that involve states like mine be considerate of the burden being placed not only on the states but on the process of developing policies that advance air quality and reduce pollution. In an era of diminishing appropriations and seemingly ever-increasing regulation complexity and burden, each action taken by EPA to mandate a response by my state forces us to make critical decisions involving programs, spending and personnel.

I thank you for your time and once again for the gracious invitation to join you today.

**August 4, 2015 Senate Environment and Public Works Hearing:**
**"Oversight of Litigation at EPA and FWS: Impacts on the U.S. Economy, states, Local Communities and the Environment."**
**Questions for the Record**
**Dallas Baker, Director and Chief of Air Divisions, Mississippi Dept. of Environmental Quality**

**Chairman Inhofe:**

1. Sue-and-settle tactics oftentimes leads an agency to short circuit necessary economic analysis and interagency review to meet unreasonable deadlines. Based on your testimony, it sounds like short timeframes also impair those with ultimate responsibility to implement subsequent regulations.
    a. What are the implications for short implementation schedules?
    **A: With a short time frame for implementation, it is a challenge to properly evaluate the most cost-efficient way to comply. As a comparison, the typical time frame for NAAQS recommendations is a year from publication. In the case of the SO2 settlement in my state, a consultant had to be hired at considerable expense to perform expedited modelling to comply. We had limited time to consider other options and to review the modeling protocol and results, increasing risk of possible inaccuracies.**

2. Given that you did not have a seat at the negotiation table during the SO2 designation sue-and-settle, what other opportunities for public participation did you have?
    a. Was participating in the public comment period meaningful?
    **A: Given the fact that it involved a settlement which directly impacted us, we should have been given more of an early opportunity to provide meaningful comment than the traditional public comment process allows. We received a draft consent decree in 2014 with a 30 day comment period and no basis of how the thresholds listed were determined. For these reasons, our ability to comment on the consent decree was restricted and provided insufficient time to solicit stakeholder input.**

    b. Did the agency even respond to your comments?
    **A: We had begun preparation of our response, but because of the time restriction we were unable to properly respond.**

3. In the SO2 designation sue-and-settle, states sought to intervene and EPA actually opposed the states motion to intervene. In fact, EPA said in its brief to the court that even if the court were to grant the motion to intervene, "intervention would not guarantee Proposed Intervenors' participation in any potential settlement negotiations."
    a. In your 20+ years' experience working with the EPA from a state position, have you encountered an agency so resistant to state involvement?
    **A: MDEQ has enjoyed a relatively good working relationship with our EPA regional staff over the years. In the past, when we commented on a rule, we**

**occasionally received specific responses and had an open, constructive dialogue with our federal counterparts that made rules generally more effective and easier to implement. In recent years however, we have detected an unfortunate trend where EPA (HQ) considers States as merely one stakeholder, much like an industry group, a citizen group or an NGO, and not as a delegated partner in implementing and enforcing the rule. We have had legitimate objections to the way recent rules are proposed and settlements reached, and unfortunately our concerns consistently have not been addressed. Third party litigation and our inability to provide meaningful feedback result in inflexible mandates States are forced to implement. This has two-fold consequences: (1) States' resources are redirected inefficiently and ineffectively, and (2) the private sector has no input nor adequate time to respond. Public and private sector entities each make long-term financial plans with ever-stretched resources. Deviating from traditional rule-making causes unnecessary financial hardship with oftentimes little meaningful improvements to the environment. We advocate against rule by litigation and for traditional rulemaking where we have an early seat at the table.**

4. According to a recent analysis by Roger Martella, former EPA General Counsel, EPA's Clean Power Plan "would risk the expansion of federal authority for enforcement actions in this sphere against States as well as numerous parties who bear no relationship to the sources that are the intended subject of § 111(d) of the Clean Air Act ("CAA"). It also could expose States and these third parties to legal action under the citizen suit provisions of the CAA by non-governmental organizations ("NGOs") seeking to compel such enforcement actions."
    a. Are you concerned that if states file a plan to comply with EPA's Clean Power Plan, they could be subject to sue-and-settle provisions that could allow the EPA and environmental NGOs to dictate energy policy in the state?
    **A: Yes.**

Senator ROUNDS. Thank you, Mr. Baker. Now we will hear from Ms. Kathleen Sgamma.

**STATEMENT OF KATHLEEN SGAMMA, VICE PRESIDENT OF GOVERNMENT AND PUBLIC AFFAIRS, WESTERN ENERGY ALLIANCE**

Ms. SGAMMA. Thank you Mr. Chairman, Ranking Member Markey, and members of the Subcommittee for the opportunity to be here today. I tried to lay out in my testimony how my industry, the oil and natural gas industry in the west, has delivered significant environmental and economic benefits to the Nation.

I would characterize profits as being used for actually delivering environmental benefit, not for standing in the way. We have innovated and we have delivered several different environmental benefits. We produce more per unit of air emissions.

We have shrunk the size of our footprint on the land significantly up to 70 percent with horizontal drilling. We continue to reduce and reuse water. We have been one of the main reasons why the United States has reduced greenhouse gas emissions. I am very proud of our environmental record.

Besides that environmental benefit we have produced huge economic benefits for the Nation. This year alone we are saving customers about $1,800 in lower natural gas and oil prices and we are enabling the United States to use energy as a strategic resource. I am very proud of the record of my industry.

But rather than recognizing that environmental benefit this Administration has doubled down on costly command-and-control regulation without commensurate environmental benefit. I have been asked to testify today to address the impact of litigation driven regulation on my industry and the economy. And while I cannot fully quantify all the different regulatory efforts against my industry right now just because of the sheer volume that we are handling, I have provided some examples in my testimony.

I think what is really more important is the impact on job creation and economic development for the general citizenry. I am very sympathetic to the States. I know industry is not sympathetic but certainly when States are forced to expend huge resources responding to hundreds of species petitions, for example, or when their State implementation plans are suddenly pulled out from under them, they have to be redone or taken over by EPA. I think that is definitely an abuse of the sue-and-settle method.

Today Western Energy Alliance is releasing an update to our sue-and-settle analysis related to two environmental groups and their settlement agreements with the Department of the Interior in 2011. We show that another year later there was another chance for more bold petitions, more litigation. Those two groups, Wild Earth Guardians and Center for Biological Diversity, certainly were not satisfied with being handed unprecedented power by the Administration to set the agenda and the resource allocation of the Fish and Wildlife Service. They continue to sue; they continue to increase petitions to historically high levels.

For example, they continue to have the majority of lawsuits related to endangered species, and they continue to submit petitions for species listing out of proportion with any other constituency. We

have released those numbers today, and it is pretty much more of the same.

When the Interior Department hands over that power to those two groups, one special interest, it is really forcing businesses, States, counties to put in place all kinds of different resources to show the Department how they are conserving species That is really not productive, because the best species protection is done on the ground by States and the local governments.

We see the same pattern with EPA. My industry has also been a target of lawsuits that have resulted in sue-and-settles specifically for new source performance standards. It is more of targeting because EPA has failed to do the required reviews for 76 percent of all industry sectors. It is becoming a source use of targeting a specific non-favored industry.

My time is up, I very much appreciate the opportunity today.

[The prepared statement of Ms. Sgamma follows:

Kathleen Sgamma
Vice President of Government & Public Affairs
Western Energy Alliance

**Testimony Before the Senate Committee on Environment and Public Works, Subcommittee on Superfund, Waste Management, and Regulatory Oversight**

**Hearing Entitled**
***Oversight of Litigation at EPA and FWS: Impacts on the U.S. Economy, States, Local Communities and the Environment***
**August 4, 2015**

**Summary**


- Innovation by the oil and natural gas industry has delivered significant environmental and economic benefits to the nation
- Rather than recognizing that environmental benefit and working with industry to encourage ongoing trends, the Administration has doubled down on costly command-and-control regulation that does not produce commensurate environmental benefit
- Regulatory overreach stifles job creation, reduces GDP, suppresses government tax revenue, and increases costs for consumers
- The regulatory overreach is driven by the environmental lobby working directly in the agencies and through litigation
- The sue-and-settle model takes policy making away from the public and puts it into the hands of one special interest driving an agenda to ultimately prevent the use of fossil fuels
- Since oil, natural gas and other fossil fuels are the basis of the modern lifestyle that keeps Americans healthy and safe while supporting the entire economy, overregulation is counterproductive to the interests of our entire society.

Any energy development–oil, natural gas, wind, solar, biofuels, and nuclear included–has environmental impacts. The key is to ensure that those impacts are minimized, and that risks to air, water, wildlife, the land and other resource values are properly reduced through appropriate, balanced regulation. I'm proud that my industry has responded to every legitimate environmental challenge and continues to innovate to develop energy that forms the basis of the economy and the modern American lifestyle while reducing environmental impact.

Western Energy Alliance represents over 450 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. The Alliance represents independents, the majority of which are small businesses with an average of fifteen employees. We provide about a quarter of the nation's oil and natural gas production while disturbing only 0.07% of public land surface.

**Environmental Benefits**

The oil and natural gas industry has increased production dramatically while significantly reducing air emissions per unit of production. Increased natural gas production, while indeed producing emissions at the well site which are managed to health standards, leads to cleaner air overall by enabling increased natural gas electricity generation.[1]

Besides the direct air quality health benefits of reduced criteria pollutants from clean-burning natural gas, it has provided significant greenhouse gas emissions reductions. The Brookings Institution estimates that modern combined-cycle natural gas turbines cut 2.6 times more carbon-dioxide emissions than using wind, and four times as many emissions as solar.[2] The Environmental Protection Agency's (EPA) greenhouse gas inventory shows that the natural gas industry continues to reduce methane emissions, by 38% since 2005 even as production has climbed 26%,[3] while University of Texas and Environmental Defense Fund studies show leakage rates at upstream production sites at a mere 0.38%.[4]

The oil and natural gas industry has significantly reduced impact on the land through horizontal and directional drilling combined with advanced hydraulic fracturing techniques that enable the clustering of multiple wells on a single pad. These continual innovations over the last several years have dramatically shrunk the amount of surface disturbance per well and reduced fragmentation. In 2012, the disturbance reduction resulting from innovation in drilling technology may have approached 70% in Wyoming, for

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[1] For example, the Pennsylvania Department of Environmental Protection (DEP) finds that "Significantly, since 2008, when unconventional drilling across the state began quickly increasing, cumulative air contaminant emissions across the state have continued to decline." According to the DEP, the reductions represent "between $14 billion and $37 billion of annual public health benefit."

[2] *The Net Benefits of Low and No-Carbon Electricity Technologies*, Charles R. Frank Jr., Global Economy and Development at Brookings, Working Paper 73, May 2014.

[3] Energy in Depth summary of EPA Greenhouse Gas Inventory and Energy Information Administration (EIA) data, April 15, 2015.

4 *Methane Emissions from Process Equipment at Natural Gas Production Sites in the United States: Liquid Unloadings*, David T. Allen et al., December 9, 2014; *Methane Emissions from Process Equipment at Natural Gas Production Sites in the United States: Pneumatic Controllers*, David T. Allen et al., December 9, 2014.

example.[5] In addition, oil and natural gas supplies 63% of total American energy[6] while using just under 0.025% of total U.S. water use.[7]

These primary innovations are industry-driven by companies that are constantly looking for better ways to do things smarter and more efficiently to use less energy, water and other resources. There is a built in incentive for us to do so; greater efficiency has dramatically reduced the time required to drill and complete wells, resulting in cost savings that are passed on to consumers. Increased efficiency doesn't just help our bottom line–it delivers environmental benefits.

You might think that all our good work that bolsters the economy and creates jobs while protecting the environment would be applauded and supported by the Administration. We have tangibly benefitted the environment while being one of the few bright spots in an economy that has sputtered along for so many years. We have also reduced energy prices for consumers, saving households an estimated $1,100 this year from lower oil prices[8] and up to $725 annually from low natural gas prices.[9]

The American oil producer has put so much downward pressure on global oil prices that we have caused OPEC to fundamentally react, as Saudi Arabia scrambles to maintain market share. American oil and natural gas are a strategic asset that could be used to free Europe from Russian domination, if only export controls did not continue to impede our foreign policy interests. Since the price at the pump is a constant source of pressure for the President and other politicians, one might be forgiven for thinking that there might be some appreciation expressed from the Administration.

**Regulatory Overreach**

Quite the opposite is true. The Administration has been focused on an overwhelming number of new regulations that cumulatively extend far beyond reasonable regulatory oversight and into mechanisms for controlling and slowing oil and natural gas production in America. The regulatory overreach my industry is currently experiencing is probably only eclipsed by that against the coal industry, which has been labeled a war. The number of simultaneous regulations results from a politically motivated agenda, advanced by the environmental lobby either through the revolving door between environmental groups and the regulatory agencies or through litigation and the settlement process.

The staff report from Senator Vitter has detailed extensively the collusion between EPA and the unaccountable, nonproductive environmental lobby, so I will not cover that ground.[10] My testimony will instead focus on the impact to the oil and natural gas industry as one example of how productive

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[5] *Oil & Gas Impacts on Wyoming's Sage-Grouse: Summarizing the Past & Predicting the Foreseeable Future, & Human-Wildlife Interactions*, David H. Applegate & Nicholas L. Owens, 2014.
[6] *Primary Energy Consumption by Source*, EIA, 2014.
[7] *Total Water Use in the United States*, U.S. Geological Survey, 2005.
[8] "U.S. households could save $1,100 from falling gas prices," *Market Watch*, December 2, 2014.
[9] *How Cheap Natural Gas Benefits the Budgets of U.S. Households*, The Boston Consulting Group, February 3, 2014.
[10] *The Chain of Environmental Command: How a Club of Billionaires and Their Foundations Control the Environmental Movement and Obama's EPA*, U.S. Senate Committee on Environment and Public Works, Minority Staff Report, July 30, 2014.

businesses that are the job creators and the engines of our economy are prevented from helping the U.S. economy reach its full potential.

I cannot fully quantify the cumulative impact of all these regulations, since, with a four-person advocacy staff including myself, we can barely keep up with all the regulation. Last year we engaged in 35 regulatory processes and this year we have already filed 26 comments. However, others provide that perspective; the National Association of Manufacturers estimates that regulations cost the economy $2.028 trillion annually.[11]

We have been able to determine the cost of some specific regulations. For example, the BLM hydraulic fracturing rule would cost society $345 million annually.[12] The costs of the New Source Performance Standards (NSPS) and amendments to the National Emissions Standards for Hazardous Air Pollutants (NESHAP) for the oil and natural gas sector finalized in 2012 outweigh the benefits by between $98 million and $174 million.[13] Depressed economic growth resulting from restrictions on the oil and natural gas industry ostensibly to protect the Greater Sage Grouse range from $2.435 billion to $4.847 billion, depending on how BLM and the Forest Service will implement restrictions through their land use planning documents and the ultimate listing decision by the U.S. Fish & Wildlife Service (FWS).[14] These are but three examples of the costs of the many regulatory processes affecting the oil and natural gas industry.

By the same token, the Administration can barely keep up as it tries to achieve all its regulatory goals before the clock runs out on January 20, 2017. The inevitable corners that are being cut in the regulatory process leave the agencies vulnerable to future lawsuits, but this time from industries that are appropriately using the courts as a last resort defense to protect themselves and the economic benefits they provide.

Government agencies like the Department of the Interior (DOI) and EPA are cutting corners by not providing the scientific support and data required by statute to properly justify new regulations and to show they deliver benefits commensurate with the cost. The agencies are also cutting corners by not following proper procedures. Procedures are not just mere technicalities, but are designed as a check on agencies to ensure they are serving the public.

The unexpected victory Western Energy Alliance and the Independent Petroleum Association of America have achieved in forestalling the implementation date of the Bureau of Land Management's (BLM) hydraulic fracturing rule is a case in point. After first winning a temporary delay from a June 24th implementation date, we were further granted more delay by BLM itself, which cannot yet provide the

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[11] *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business*, A Report for the National Association of Manufacturers by W. Mark Crain and Nicole V. Crain, September 10, 2014.
[12] *Business Impact of Revised Completion Regulations*, John Dunham & Associates (JDA) analysis for Western Energy Alliance, July 22, 2013.
[13] *Cost Benefit Analysis of Proposed NSPS and Amendments to the NESHAPs for the Oil and Natural Gas Industry*, JDA analysis for Western Energy Alliance, October 10, 2012.
[14] *Final Analysis of the Impact of Greater Sage Grouse Restrictions on Oil and Natural Gas Development and Production*, JDA analysis for Western Energy Alliance, May 14, 2015.

administrative record to the District Court. The record is a basic part of any rulemaking, and the disarray indicates that BLM is overreaching as it tries to implement the fracking rule along with initiating new rulemaking on royalty rate increases, measurement, flaring and venting while simultaneously trying to finalize 68 Resource Management Plans and new mitigation and planning procedures. What's particularly illustrative is that BLM has already taken nearly five years on this rule. The planned new regulations are cumulatively larger and more complex, yet proposed rules have not even yet been released. It strains credulity to see how BLM can succeed with all these regulatory goals before the end of the Administration.

**Environmental Group Litigation**

**Sue-and-Settle Analysis: 2011 ESA Settlements**

Focusing on the topic of this hearing, how environmental litigation is driving regulation from the U.S. Fish & Wildlife Service (FWS) and EPA, I'll start with the most egregious example because it affects not just the oil and natural gas industry, but productive users of public and private lands across the United States: two settlement agreements related to hundreds of species listings under the Endangered Species Act (ESA).

Western Energy Alliance is today releasing an update to our Sue-and-Settle legal analysis, originally released in 2014,[15] which shows another year, another chance for environmental groups to overload FWS with listing petitions and lawsuits that divert resources away from actual species recovery and into litigation and bureaucratic process.[16]

In 2011, two serial litigants, WildEarth Guardians (WEG) and the Center for Biological Diversity (CBD) reached settlement agreements with DOI on a combined 878 species.[17] DOI's justification for entering into the closed-door settlement agreements that excluded the public, elected officials, states, localities, and other stakeholders was to limit future listing petitions and litigation. But DOI essentially handed over policymaking to two special interest groups and committed its resources to the priorities of these two groups. Ceding that much power to one special interest has placed a burden on the federal government, states, productive industries, and private landowners that is alarming. This hearing today is encouraging, as oversight is an important step toward wresting that power back from very narrowly focused unelected, unaccountable and unproductive interests.

The purpose of our legal analysis is to determine if DOI indeed met its goal; having allowed CBD and WEG to set the FWS listing agenda for six years, did it at least achieve a stipulation of the settlement,

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[15] *Sue-and-Settle Legal Analysis: The Department of the Interior's 2011 Settlement Agreement with Wild Earth Guardians and the Center for Biological Diversity*, Western Energy Alliance, September 29, 2014.
[16] *Sue-and-Settle Legal Analysis: The Department of the Interior's 2011 Settlement Agreement with Wild Earth Guardians and the Center for Biological Diversity*, Western Energy Alliance, August 4, 2015.
[17] *Stipulated Settlement Agreement in the U.S. District Court for the District of Columbia, WildEarth Guardians v. Salazar*, MDL Docket No. 2165, May 10, 2011. *Stipulated Settlement Agreement in the U.S. District Court for the District of Columbia, Center for Biological Diversity v. Salazar*, MDL Docket No. 2165, July 12, 2011

i.e., that the groups would not sue on the species named in the agreement? And would they stop overwhelming FWS with new petitions? In that sense, the settlements were a resounding failure. Using legal and FWS databases, Western Energy Alliance conducted an analysis of petitions and lawsuits filed since the huge settlements were reached in 2011 and discovered that:

- 53 petitions have been filed with FWS requesting listing or uplisting (from threatened to endangered) on 129 species. WEG and CBD are responsible for 38 (72%) of the petitions covering 113 (88%) of the species.

- Requests for species listings have climbed to an average of 31 per year, up from 20 prior to 2007. FWS is still struggling to deal with the dramatic increase in species petitions from 2007 to 2010, with 695 species in 2007, 56 in 2008, and 63 in 2009. In 2010, FWS received a single petition from CBD to list 404 species.

- With complete disregard for the spirit of the agreements, CBD delivered a large 53-species petition to FWS less than a year after the settlements were approved, prompting FWS Assistant Director for Endangered Species Gary Frazer to state, "We're disappointed that they filed another large, multi-species petition."

- 71 different plaintiffs have filed 43 lawsuits challenging FWS decisions on 107 different species. It's not surprising that more plaintiffs are resorting to legal action, since the settlements shut out policymakers and other stakeholders that are now left with few other options. Yet despite being handed policy privileges by FWS through closed-door negotiations, WEG and CBD remain the most prolific litigants, with 23 lawsuits (53%) involving 45 species (42%).

- 50 of those 107 species that are subjects of new lawsuits were already addressed in the settlement agreements, with CBD and WEG responsible for the lawsuits on 34 (68%) of those species. These radical environmental groups will not be satisfied unless all of their petitions result in endangered listings, whether or not such determinations are warranted.

Sue the government, get favorable settlement agreements, shut out the public, yet keep suing if 100% of your demands are not met. It's not a surprise when the goal is to "bring industrial civilization to its knees."[18] CBD's founders describe the ESA as "an incredible law where (sic) we can make people do whatever we want,"[19] and the Interior Department decided to go along with that agenda.

Western Energy Alliance supports legislation to limit the ability of groups to sue-and-settle behind closed doors without the involvement of elected state, local and federal official, and to limit reimbursement under the Equal Access to Justice Act. The current FWS rulemaking on the ESA petition process to prevent bulk petitions and involve state wildlife agencies is encouraging, as it is a sign that

[18] "A bare-knuckled trio goes after the Forest Service," *High Country News*, March 30, 1998.
[19] "No People Allowed: A Radical Environmental Group Attempts to Return the Southwest to the Wild," *The New Yorker*, November 22, 1999.

even the agency has had enough of the abuse of ESA, but we encourage Congress to codify it into statute along with other ESA reforms.

**Sue-and Settle: EPA and the Clean Air Act**

Likewise, EPA has allowed its agenda to be driven by the environmental lobby when it comes to oil, natural gas and many other human endeavors. While I could discuss regulatory proceedings that broadly affect states and many economic activities, like the Waters of the U.S. Rule, regional haze,[20] the ozone National Ambient Air Quality Standard (NAAQS) and others, I am going to limit my testimony to examples that just directly affect oil and natural gas.

In addition to settling with environmental groups to embark on additional regulation, EPA has settled away its statutory discretion to determine that new regulations are not appropriate. This goes beyond provisions in the Clean Air Act (CAA) that enable citizen lawsuits to enforce statutory deadlines and into setting new statutory standards by sidestepping Congress.[21] As of October 2014, there have been 88 sue-and-settle cases arising under the CAA, Clean Water Act (CWA) and ESA during the Obama Administration. Of these 88 cases, industry groups brought nine while environmental groups brought the remaining 79. Of those 79 cases, 61 were brought under the CAA.[22] I would like to highlight a few that directly affect my industry.

**NSPS Subpart OOOO/NESHAP**: In 2009, Wild Earth Guardians and the San Juan Citizens Alliance sued EPA alleging the agency's failure to meet CAA requirements to conduct NSPS and NESHAP review and revision requirements for the oil and natural gas production source category. The CAA requires EPA to conduct these reviews every eight years for a whole host of industry segments.[23] A consent decree was entered in 2010 requiring EPA to issue a proposed rule by July 28, 2011, with final action no later than February 28, 2012. Since promulgating the final rule on August 16, 2012, Western Energy Alliance members have incurred millions of dollars in compliance costs with more expected as EPA issues new rules targeting further reductions of volatile organic compounds and methane. While some concerns have been resolved through reconsideration, the Administration's promised methane rules may be released as an extension of the rulemaking initiated as a result of sue-and-settle tactics.

EPA has claimed since that time that its hands are tied because it had indeed failed to meet the statutory deadline. But conducting a review does not mean the agency must implement extensive new regulations that lack adequate justification. Western Energy Alliance and other industry trades have filed several administrative and judicial review petitions in response to the impracticalities of the complex rules rushed in place to meet unrealistic deadlines imposed by the settlement. Given the green light,

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[20] *Sue and Settle: Citizen Suit Settlements and Environmental Law*, Janette L. Ferguson and Laura Granier of Davis Graham & Stubbs LLP, pp. 3-5 provides a good summary of how environmental lawsuits led to the federal usurpation of State Implementation Plans of regional haze.

[21] *Id*, p. 5.

[22] "An Empirical Analysis of Sue and Settle In Environmental Litigation," Tyson, Ben, *Virginia Law Review*, Vol 100:1545 October 20, 2014.

[23] Clean Air Act § 111(b)(1)(B) (every 8 years), 112(d)(6) (as necessary, no less frequently than every 8 years), and 112(f)(2) (as necessary, no less frequently than every 8 years).

EPA did not just meet its statutory obligations for review; it used the settlement as an excuse to overreach with very complex, expensive new requirements.

EPA made mandatory reduced emissions completions for natural gas wells, even though industry had developed the technology and was rapidly adopting it. But by making mandatory what companies were already doing, EPA added layers of record keeping and other red tape. Companies must now divert extensive resources away from productive activities that would otherwise grow the economy and create jobs into non-productive record keeping and reporting.

Furthermore, this as an example of targeting one industry. The oil and natural gas industry has continually reduced emissions even as production climbs, through regulatory compliance, technical innovation, and voluntary mitigation measures. However our success has been met by EPA with more red tape, more punitive enforcement actions, and more extensive data digging exercises that are expensive and extremely time consuming. EPA has the same CAA eight-year review requirement for 70 other sectors with NSPSs. As of October 2011, just 17 (24%) of those sectors had been revised within the eight-year review period. Such selective enforcement can become a source of cronyism, as favored industries or companies are left alone while others like oil, natural gas and coal are targeted.

In reality, we should be glad as a society that EPA cannot keep up with all its CAA mandates, as our economy would be even more constrained by regulation than it already is, and our workforce participation rate would be even lower than it has already sunk. Society would be spending more resources on red tape and less on actual environmental improvements. However, the larger point to be made is that Congress should revisit some of the provisions of the CAA and other regulations that stifle economic growth. Through initial regulation focused on large environmental problems combined with the continual innovation of industries, air emissions have sunk 62% since 1980.[24] While more work needs to be done, command-and-control CAA mechanisms are not the most effective way to do so, especially when focused on smaller benefits at greater costs. The upcoming change to the ozone NAAQS is the most obvious examples. Congress should amend the CAA to make it more effective while reducing unproductive and ineffective red tape.

**SSM SIP Call:** The Sierra Club filed a petition for rulemaking on June 30, 2011, asking EPA to revise all State Implementation Plan (SIP) provisions where those SIPs contained affirmative defenses for monetary penalties associated with excess emissions during Startup, Shutdown, and Malfunction (SSM) events. Subsequent to this petition, the U.S. Court of Appeals for the D.C. Circuit upheld the Sierra Club's claims in its suit against EPA that SSM affirmative defense provisions violated the CAA even for malfunctions (not limited to just planned startup and shutdown events.) In May 2015, EPA issued a SIP call to 36 states to revise relevant portions of their SSM affirmative defense provisions contained in those SIPs, including for malfunction provisions. These SIP Calls have the potential to greatly impact Alliance members' existing and future operations, including through increased exposure to enforcement and potential increased penalties for unpreventable equipment breakdowns. The SIP calls force state environmental departments to expend their limited resources at the behest of one environmental group.

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[24] *Air Quality Trends*, EPA, 2013.

There are signs that the agencies themselves have had enough of the overreach by environmental groups. Having unleashed the beast of overregulation, they are finding they do not have the wherewithal to do everything required by their political and environmental masters. The agencies recognize that they do not have the manpower and resources to implement all the new requirements, such as to issue all the new permits required from a whole host of new regulations. Without permits, job-creating activities throughout the economy will be further constrained. It is time to recognize that the balance between regulation and the economy has been fundamentally upset, and requires correction. Western Energy Alliance calls on Congress to help with that realignment.

It is not just a matter of one industry, the oil and natural gas industry. Since oil, natural gas and other fossil fuels are the basis of the modern lifestyle that keeps Americans healthy and safe while supporting the entire economy, agenda-driven overregulation is counterproductive to the interests of our entire society. Overregulating us will result in pain to all Americans in the form of higher energy prices, fewer jobs, and less economic opportunity.

**August 4, 2015 Senate Environment and Public Works Hearing:**
**"Oversight of Litigation at EPA and FWS: Impacts on the U.S. Economy, states, Local Communities and the Environment."**
**Questions for the Record**
**Kathleen Sgamma, Vice President of Government & Public Affairs, Western Energy Alliance**

**Chairman Inhofe:**

1. Do you think the ESA "mega settlement" targeted species to lock up certain areas from development and job creation, as opposed to species that may have been most in need of potential protection under ESA?

**Answer:** It is clear that the two environmental groups that have settled regarding 878 species, WildEarth Guardians (WEG) and the Center for Biological Diversity (CBD), are very radical. CBD has even publicly stated that it is not really interested in species protection as much as in using the Endangered Species Act to bring modern civilization to its knees.

However, I do not think they necessarily took a precise approach. Having settled on 878 species, they realize that they don't have to be particularly targeted. By taking the shotgun approach and drawing in so many species spread across the entire country, they knew they would be invariably hitting many different industries and productive activities. Which is not to say that there aren't certain species like the sage grouse that they've targeted against such industries as oil and natural gas and ranching. But the sheer volume indicates they are going for quantity.

This shotgun approach is definitely taking resources away from species that are truly in need of protection. The Fish & Wildlife Service (FWS) spends so much time responding to petitions and going through process, that resources are spent at desk work rather than in the field actually benefitting species. Even FWS has become exasperated at this dilution of resources away from deserving species, and has proposed rules to make the petition process more robust. The FWS's proposed rule includes standards for limiting petitions to one species, requiring petitioners to provide robust scientific and state population data, and consultation with states. While FWS's proposed rule is a good one, particularly with some changes that we and others have suggested (I have attached our comments for more details), the final rule may not be as strong, particularly if FWS adjusts the final based predominantly on comments from environmental groups such as CBD and WEG.

The best way to ensure a robust petition process that doesn't needlessly waste limited resources on undeserving species is for Congress to codify changes similar to FWS's proposed rule. Since the Administration has proposed these common-sense measures, this may be a good opportunity to advance meaningful, targeted ESA reform to the petition process in a bipartisan manner so that less time and resources are spent reacting to petitions for species that are not truly threatened or endangered and more resources on recovering species on the brink.

2. In your written testimony, you state that since 2011, 53 petitions have been filed with the FWS to list or up to list 129 species and that 43 lawsuits have been filed challenging FWS decisions.

a. How easy is it for an ordinary citizen to obtain this information? Is it easily accessible in a central location on the FWS website?

**Answer:** It is not easy to put this information together. We had to hire outside legal counsel to dig through FWS, the Federal Register, and legal databases for our Sue-and-Settle legal analysis, which we recently updated and released on the day of the hearing. I've attached our methodology document, which accompanies our study because it is neither easy nor straightforward for the public to arrive at the information: "In telephone conversations with [Fish & Wildlife] Service employees, we were told that the Service does not maintain a publicly available internal list of currently active petitions." Our methodology document explains how we arrived at the numbers using a publicly available database, the Environmental Conservation Online System, and the Federal Register to identify petitions since the 2011 settlements, but it certainly was not a simple process.

3. If an environmental group files a petition to list a species located in a particular geographic area, how are local governments and nearby land owners or businesses informed of the petition?

**Answer:** They are not informed at all. FWS has proposed revisions to the regulations on petitions that include many good elements, one of which is a requirement that a petitioner consult with wildlife agencies in affected states prior to submission of a petition. In our comments (attached) we suggest this consultation should be extended to county and local governments in all affected areas.

4. What if the FWS fails to act and the petitioner files a notice of intent to sue – does the FWS disclose notices of intent on its website or the Federal Register?

**Answer:** FWS does not make the information readily available on its website, nor does it disclose notices of intent to sue in the Federal Register. There should be an easy to find repository of that information service-wide on the main FWS page. It appears, from attempting to find NOIs by searching through FWS websites, that the information may be available on the regional websites, but not all seem to do so in an organized manner, if at all. The Southeast region has an "ESA Actions" page which lists petitions, NOIs and other useful information on one page, but it is difficult to navigate from the regional main page. Other regions do not have their information organized in this convenient although hard-to-navigate-to format. A standard format should be available for this information that is so key to the ESA work of FWS. Perhaps reform of the ESA that included standards for making information available is in order. However, since FWS is so overwhelmed by the highly prescriptive nature of the act as it is, other updates should be included to help make the act more manageable.

5. Does the FWS disclose litigation or attorney fees on its website?

**Answer:** FWS does not to the best of my knowledge.

6. Would you agree that the current law and FWS regulations make it difficult for local governments and land owners to know what listing decisions may be the subject of

threatened litigation and sue and settle agreements?

a. How would you like to see this kind of information made available?

**Answer:** I would agree that it is very difficult for local governments and landowners to follow all activities related to ESA listings. FWS does not make the information readily available on its website, and the act does not require it. I believe FWS itself is overwhelmed by the highly prescriptive, bureaucratic requirements of the ESA, and itself has a hard time tracking the information.

Congress surely did not foresee that the highly prescriptive nature of the ESA and the deadlines it mandated would become such a stumbling block to the efficient management and conservation of endangered species. Congress surely did not foresee that environmental groups would use the act to tie up the service in knots and inundate it with paperwork that diverts resources away from true conservation to desk work. Common-sense, targeted legislation to update and modernize the ESA should be supported by anyone who truly wants to protect species and would rather have resources allocated to conservation than paperwork. With higher standards for the petition process, as supported by the Administration in the proposed rule, FWS could have a better handle on its workflow and the communication of it to the public.

7. Do you think the process required under the Clean Air Act – where proposed settlement agreements are subject to public comment – provides meaningful opportunities to participate in the settlement process or is the settlement too far along at that point?

**Answer:** The ability to comment on CAA settlements can be quite limited, unless one happens to be a member of EPA's politically favored constituency. EPW Republicans have documented extensively in a 2014 minority report the collusion between EPA and the environmental lobby. That collusions shows in the application of CCA settlement agreements. When an environmental group sues EPA about a company's CAA permit, the company's interests are often largely ignored during the lawsuit and any subsequent settlement, yet when a company settles with EPA in a consent decree, environmental groups seem to get ample opportunity to weigh in on it.

Given EPA's discretion on the extent it considers public comments and its likelihood to ignore comments from those it politically disagrees with, the CAA requirement on settlement comments has not been very effective. However, it is better than what happens under the ESA, where elected officials, landowners, businesses, and the general public have no idea that a settlement is in the works until it has already become a court order. Perhaps the CAA requirement is a starting point for updating the ESA, with additional requirements such as enabling affected state and local elected officials to have a seat at the table during settlement negotiations. In that way, the public would be represented through its elected officials, rather than just one special interest having a seat at the table.

WESTERN ENERGY ALLIANCE

September 18, 2015

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Public Comments Processing
Attn: FWS-HQ-ES-2015-0016
U.S. Fish and Wildlife Service
MS: BPHC
5275 Leesburg Pike
Falls Church, VA 22041

**Re: Endangered and Threatened Wildlife and Plants; Revisions to the Regulations for Petitions**

Dear Sir/Madam:

On May 21, 2015, the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (collectively, the Services) issued a proposed rule to amend the existing regulations governing Endangered Species Act (ESA) petitions under 50 C.F.R. §424.14.[1] Western Energy Alliance supports improvements to the ESA that protect fish, wildlife, and plant populations while also providing for responsible resource management and energy development. The Alliance is therefore generally supportive of the proposed rule and appreciative of the Services' intent in updating the procedures for submission of petitions seeking the listing, delisting and change in status for a species.

Western Energy Alliance represents over 450 members involved in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. The Alliance represents independents, the majority of which are small businesses with an average of fifteen employees.

Improvements to the petition process are necessary because the current process has been frequently abused to increase the number of listed species, regardless of merit. Over the last decade the number of petitioned species has increased dramatically, as certain parties have used the petition process to force the Services to make voluminous listing determinations. The most egregious example of this tactic was a single petition in 2010 that identified over 400 species, leading to a legal settlement with FWS that requires action on 757 species over seven years.

The 2011 settlements did not bring an end to large, multi-species petitions. Since the settlement, petitions have been filed with FWS requesting listing or uplisting action on at least 129 species, including one petition that identified 53 species, while NMFS has

[1] 80 Fed. Reg. 29286 (May 21, 2015).

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received at least 26 petitions covering 155 species. Additionally, these petitions have resulted in 43 lawsuits covering more than 100 species. In fact, the two environmental groups that FWS settled with are themselves responsible for 72% of all new petitions covering 88% of petitioned species.[2] We believe the proposed rule is a good start at getting this abuse of the petition process under control.

It is clear some parties are repeatedly employing a strategy of overwhelming FWS with listing petitions and bringing subsequent legal actions to force FWS to act on these petitions. The goal of this approach is ultimately to reach a settlement with FWS that requires expedited consideration of numerous species. This "sue-and-settle" tactic clearly undermines the ESA petition process and the law in general, and we support changes that would eliminate its use.

The proposed changes are intended to "improve the content and specificity of petitions and to enhance the efficiency and effectiveness of the petitions process to support species conservation." The key components of the improved process are:

- Allowing for one and only one species to be the subject of a petition
- Requiring consultation with relevant state agencies at least 30 days prior to submission to the Services
- Certifying that all information relevant to the petition and the species is provided by the petitioner, including information that may lead to a negative finding on the petitioned action
- Clarifying the statutory timeframes for the petition and resetting the deadlines if supplemental information is provided by the petitioner before an initial finding is made

Western Energy Alliance believes that each of these proposed changes would represent an improvement on the current process. Below are our suggestions for further improvement of these components.

*I. One and Only One Species May be the Subject of a Petition*

As noted in the proposed rule, "Although the Services in the past have accepted multi-species petitions, in practice it has often proven to be difficult to know which supporting materials apply to which species, and has sometimes made it difficult to follow the logic of the petition."[3]

[2] *Sue-and-Settle Legal Analysis*, Western Energy Alliance, August, 2015.
[3] 80 Fed. Reg. 29287 (May 21, 2015).

Specifying that each petition may only include one species will promote a clearer understanding of the justifications with legitimate supporting data for a particular listing or de-listing decision. It would also promote a reduction in the bottleneck of the Services' resources created by petitioners bundling species to deliberately slow other proponent activities and state management policies. Finally, the burden of proof for a warranted listing decision would be placed on the petitioner instead of the Services, which would result in a more thorough petition. Western Energy Alliance supports this proposed requirement.

*II. Consultation with Relevant Agencies*

States and local governments play a crucial rule in the management, best available science, and protection of threatened and endangered species in their jurisdiction. Furthermore, as the supplementary information sheet acknowledges, states and localities have significant expertise regarding the local land use and habitat that will affect a species.

Requiring petitioners to first consult with the states in which a species is located will certainly encourage cooperation and communication "among would-be petitioners and State conservation agencies prior to the submission of listing or critical habitat petitions to the Secretary."[4] It may also result in fewer petitions to the FWS in instances where data from a state agency shows that further evaluation of a listing decision is not warranted based on the science. Prior consultation would reduce the use of the Services' resources on petitions that lack basic scientific justification.

Western Energy Alliance supports this component of the proposed rule, and also believes it should be extended to incorporate county and local government consultation prior to a petition. This change would accord with other sections of the ESA such as §4(b)(5)(A)(ii), which provides that for any listing proposal issued by the Secretary of the Interior, the Services must "give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, **and to each county or equivalent jurisdiction in which the species is believed to occur**, and invite the comment of such agency, and each such jurisdiction, thereon."[5]

Although states have primary jurisdiction over the protection of wildlife in the absence of a Service listing and management of habitat, county and local governments can also play a key role in management and conservation of a species. Local land use activities and habitat conditions are important factors in any listing decision, and the state, counties and local governments who monitor and report on these factors ultimately have the most complete and accurate data. Excluding these jurisdictions from the consulting process may lead to a less-than-complete record for the Services to evaluate. The ESA clearly recognizes the value of county and local government involvement in the listing process, and expanding the consultation process in the proposed rule to include those government bodies would strengthen the petition process.

[4] *Id.* At 7.
[5] 16 U.S.C. §1533(b)(5)(A)(ii).

Western Energy Alliance further recommends that the consultation period be extended to 90 days from the 30 days currently required in the proposed rule. This change will allow for robust interaction between the petitioners and the states, ensuring a complete view of the status of a particular species. The proposed 30 day comment period is simply too short for states, counties and other localities to adequately review and comment upon the petition. A longer review period will allow for a comprehensive review by the states and counties, which will in turn lead to the most efficient assessment of the petition by the Services.

Western Energy Alliance believes the addition of counties and local governments in the consultation process, and a 90 day comment period, would be valuable to the ESA petition process.

*III. All Relevant Information Provided by Petitioners*

Western Energy Alliance supports the component of the proposed rule that would require petitioners to submit "all relevant information **(including information that may support a negative 90-day finding)** that is reasonably available" with their petition.[6] This requirement would ensure a full record of best available information for review by the Services, rather than an incomplete record that may be biased towards a finding of warranted. We further support the provision that would allow the Secretary to reject the request without making a finding if the petition does not supply all relevant information.

*IV. Statutory Timeframes and Supplemental Information*

Finally, Western Energy Alliance supports the clarification of the statutory timeframes that apply to the petition process. Requests that do not meet the statutory requirements would be rejected without a finding, which would ease the burden on the Services in responding to spurious petitions. For those that do meet the requirements, the clock would begin to run, with a formal notice of receipt of the petition sent within 30 days. The Service would also have 90 days from submission to make a finding on whether there is sufficient information available that the petitioned action may be warranted, and one year in which to make a final determination.

Importantly, the proposed rule clarifies that supplemental information received by the Service within the above timeframe would be treated as a new petition, and the statutory deadlines would be reset from the time of receipt of the supplemental information. Western Energy Alliance supports this change to ensure the Service has sufficient time to review all available information, including any information that was omitted from the initial petition and new information which might be discovered after the petition process has begun.

[6] 80 Fed. Reg. 29294 (May 21, 2015).

V. *Response to Specific Requests for Comments*

Beginning on Page 26 of the supplementary information sheet, the Services request responses to specific questions.

**Question:** "We specifically seek comment on proposed paragraph (b)(9), requiring petitioner coordination with States prior to submission of a petition to the Fish and Wildlife Service, and paragraph (b)(10), requiring certification that all reasonably available information, including relevant information publicly available from affected States' Web sites, has been gathered and appended to a petition filed with either Service. We note that either of these two provisions could stand alone, or both could be included in a final rule, as shown in the proposed regulatory text. We also suggested an alternative to (b)(10) that would require a certification only that relevant information from affected States' Web sites has been gathered and appended to a petition filed with either Service. We seek information on which alternatives, alone or in combination, would be most consistent with law and best achieve our goals of fostering better-informed petitions and greater cooperation with States."

**Response:** Western Energy Alliance supports the inclusion of both proposed paragraphs in the final rule. These paragraphs will work in tandem to ensure the most robust record of available data is provided to the Services in a listing or delisting petition. Requiring petitioners to coordinate with the relevant states and certify they have provided all readily available information on a species will produce the most accurate information for the Services in the most efficient manner. We believe this requirement should be extended to coordination with counties and local governments as well.

Further, Western Energy Alliance believes that it would be helpful if more narrow parameters were developed for listing petitions to ensure a petitioner has gathered "all relevant information." The petitioner should be required to identify in its certification: 1) all databases and other sources searched; 2) the dates of the last search for each database and the period searched; 3) full search strategies (including all search terms) for each database; and 4) any language or publication status restrictions used. Transparency on the search process and adequate reporting makes it possible for others reading the review to judge the thoroughness of the search, and thereby the potential of bias in the review.

**Question:** "We also seek comments and information regarding any other alternative the public may suggest to achieve the goals of greater coordination with States and better supported petitions."

As discussed above, extension of the comment period for state consultation from 30 days to 90 days and including local government participation will allow for a more complete review of available data prior to submission of a petition.

Western Energy Alliance believes the proposed rule, with small modifications, would mark a significant, positive step towards ensuring the ESA petition process is as effective and efficient as possible. The Alliance greatly appreciates the opportunity to provide these comments to the Services, and respectfully requests you take these comments into full consideration when finalizing a proposed rulemaking.

Sincerely,

Kathleen M. Sgamma
Vice President of Government & Public Affairs

**Introduction**

We have examined petitions to list species under the Endangered Species Act ("ESA") and lawsuits challenging listing decisions filed since WildEarth Guardians ("WEG") and Center for Biological Diversity ("CBD") reached their separate settlements with the U.S. Fish and Wildlife Service ("Service") in May 2011 and July 2011, respectively. Please carefully read the section titled "Methodology," which describes the methods and criteria we used to compile this information as well as the extent and limitations of the information.

Please note that we did not analyze and do not take any position on whether or not the parties to the settlements have complied with the terms thereto. We simply reviewed petitions filed since the 2011 settlements and searched the Public Access to Court Electronic Records ("PACER") database for lawsuits fitting the criteria listed below.

**Findings Related to Listing Petitions Filed Since May 2011**

- Since May 2011, at least 53 petitions have been filed with the Service requesting listing or uplisting action on at least 129 species. On average, the Service is requested to list between 2 and 3 species per month and nearly 31 species per year since May 2011.
- Of the 53 petitions submitted since May 2011, CBD and WEG have submitted 38 of the petitions, or nearly 72 percent of all petitions filed.
- CBD and WEG together have petitioned to list or uplist 113 species, nearly 88 percent of the total species petitioned since the settlements.
- It is useful to compare the number of petitions the Service has received annually since the settlements to the number of petitions it received annually prior to the settlements. Until 2007, the Service only received petitions to list an average of 20 species per year. In 2007, this number rose—sometimes dramatically. The Service received petitions to list 695 species in 2007, 56 species in 2008, and 63 species in 2009. In 2010 the Service received petitions for a substantial number of species, including a single petition from CBD to list 404 species. U.S. Dep't of the Interior-Fish and Wildlife Service, Budget Justifications and Performance Information Fiscal Year 2012, RM-1 (pdf page 45).[1] Although the current average of petitions to list 31 species annually certainly does not reach the number of petitioned species in 2007 or 2010, the Service is annually receiving petitions to list more than 150 percent as many species as were petitioned for listing prior to 2007.

**Findings Related to Listing Litigation Filed Since May 2011**

- Since May 2011, 43 lawsuits have been filed by 71 different plaintiffs challenging Service decisions on petitions to list or uplist a total of 107 different species.
- CBD and WEG together have been plaintiffs in 23 different lawsuits,[2] or more than 50 percent of the lawsuits filed since May 2011.

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[1] *Available at* http://www.doi.gov/budget/appropriations/2012/upload/FY2012_FWS_Greenbook.pdf.

[2] 18 for CBD, 6 for WEG, with one of those involving both CBD and WEG but only counting once towards the total number of different lawsuits in which CBD and WEG have been plaintiffs.

- CBD's and WEG's lawsuits have challenged listing decisions for 45 different species.
- Of the species for which decisions on petitions to list or uplist were challenged, 50 were subject to the 2011 settlements. Of these 50 species, CBD and WEG were plaintiffs in lawsuits challenging listing or uplisting decisions on 34, or 68 percent.

**Methodology**

I. PETITIONS

Our search encompassed petitions to list, or to uplist from threatened to endangered, one or more species received by the Service between the May 10, 2011 settlement and June 19, 2015. Although the CBD settlement was approved in July 2011, we started with May 10, 2011 because that was when the earlier of the two settlements, WEG's, was approved. We did not include petitions to delist or downlist from endangered to threatened one or more species, petitions to designate or revise critical habitat, or petitions for rulemakings other than listings under the Administrative Procedure Act.

In telephone conversations with Service employees, we were told that the Service does not maintain a publicly available internal list of currently active petitions. However, the Service maintains a publicly available database, the Environmental Conservation Online System ("ECOS"), of species that are candidates, species that are currently listed, or species that the Service is currently reviewing for other reasons, such as species that have been petitioned for listing and foreign species petitioned in the past that the Service continues to review in its Annual Notices of Review ("ANOR").[3]

We used ECOS as our starting point. On June 19, 2015, from the search page, we chose "Petitioned for Listing, Under Review" under the heading "Federal Listing Status," and then selected the following "Fields to Display": "Common name," "scientific name," and "regions of occurrence." This search identified 621 species that are currently under petition or being considered for another reason, such as: The species is a candidate species, which the Service reviews annually; the species was once a candidate species but has been removed from the candidate list, which the Service continues to monitor to ensure the species does not later warrant protection or candidate status; the species was a foreign species petitioned for listing prior to May 10, 2011, which the Service reviews annually in its ANORs; the species had been petitioned for downlisting; the species had been a Candidate Level 2 species under the Service's prior candidate priority system, which the Service removed from the candidate list in 1996 but continued to monitor like other species removed from the candidate list.

We narrowed this list as follows:

- We removed all species for which a petition for listing was filed before May 10, 2011. Because the ECOS search did not identify the dates of the petitions, we determined the dates of petitions through several different methods:
- For many of the species identified in our ECOS search, we determined the date of petitions by searching the Federal Register for 90-day findings on those species,

[3] *Available at* http://ecos.fws.gov/tess_public/pub/adHocSpeciesForm.jsp.

searching by scientific name. These 90-day findings identified the applicable petition dates.

- Many of the 621 species our ECOS search identified had appeared in petitions filed by the Center for Biological Diversity (CBD) or WildEarth Guardians (WEG) prior to the 2011 settlements.

- Other species were foreign species for which petitions were filed in the 1980s or 1990s and which the Service has listed in its Annual Notice of Review for foreign species as recently as 2013. 78 Fed. Reg. 24,604 (April 25, 2013).

We also removed certain other species identified in our ECOS search, for which we found no evidence of petitions having been filed since the 2011 settlements, for the following reasons:

- The Camp Shelby burrowing crayfish, the Painted clubshell, the Alabama clubshell, and the Holsinger's Cave Beetle had been candidates at one point but were removed in recent years. The Service generally continues to monitor species removed from the candidate list, which explains the continued inclusion of these species in the ECOS database. *See, e.g.*, 78 Fed. Reg. 70,104, 70,107 (Nov. 22, 2013) ("We will continue to monitor the status of these species [removed from the candidate list] and to accept additional information and comments concerning this finding. We will reconsider our determination in the event that new information indicates that the threats to the species are of a considerably greater magnitude or imminence than identified through assessments of information contained in our files, as summarized here.").

- Certain species (notably three separate populations of the grizzly bear) had been listed in the 1970s and thereafter subject to multiple downlisting petitions.

- A large number of these species had been Candidate Level 2 species under the Service's old candidate priority system (in use until 1996), last appeared in the Federal Register in 1994, and were subsequently removed from the candidate list in 1996 when the Service changed its candidate procedures.

We added a number of petitions to our list found through sources other than ECOS:

- To find species that the Service had since May 10, 2011 disposed of with negative 90-day findings, and which would not appear in the list we downloaded because they were no longer "under review," we searched for 90-day findings made from May 10, 2011 through June 19, 2014. We added any species we found for which petitions had been submitted from May 10, 2011 through the present.

- We added a number of petitions from a list received from another industry member. That list included species petitions received through June 30, 2014.

II. LITIGATION

Our summary includes the number of lawsuits filed since the 2011 settlements entered into between WEG and the Service and CBD and the Service, respectively. Thus, our search of the PACER database, which is maintained by the federal courts, is limited to lawsuits filed from May 10, 2011 through June 19, 2015.

Further, our summary is limited to lawsuits that challenge decisions by the Service to list or uplist one or more species, or decisions by the Service not to list such species through a negative 90-day finding, a not warranted 12-month finding, a warranted but precluded finding, or a decision not to list a species following a 12-month warranted finding and proposed rule (e.g., the Service issued a 12-month finding on the dunes sagebrush lizard of warranted, but later decided not to list due to conservation efforts).

We also limited our search to the following defendant search terms:

- "U.S. Fish"
- "United States Fish and"
- "United States Fish &"
- "Fish and Wildlife"
- "Fish & Wildlife"
- "Salazar, Ken"
- "Jewell, Sally"
- "Ashe, Dan"
- "Gould, Rowan"
- "Davis, Laura"
- "Jacobson, Rachel"[4]

We excluded the following categories of lawsuits:

- Lawsuits against the Service but not challenging ESA listing decisions;
- Lawsuits challenging the Service's negative findings on petitions to delist species or downlist species from endangered to threatened (e.g., delisting of gray wolf in certain states); note that we did include lawsuits challenging actual decisions to delist or downlist (e.g., gray wolf). If you desire, we can create a list adding in the lawsuits challenging the Service's negative findings on petitions to delist or downlist;
- Lawsuits challenging or requesting decisions to designate (or not designate) or revise critical habitat;
- Lawsuits challenging listing decisions for marine species under the jurisdiction of the Department of Commerce; and

[4] Our initial searches revealed a significant lack of consistency in the defendants named in suits challenging Endangered Species Act (ESA) listing decisions. Thus, we broadened our list of search terms to include not only variations on "U.S. Fish and Wildlife Service" (see list in text, above), but also the Secretaries of the Interior (Salazar and Jewell), Directors of Fish and Wildlife (Rowan Gould and Dan Ashe), and other relevant Interior and Service officials active during the time frames searched.

- Pending Notices of Intent to Sue (NOI). We have no way of reliably locating and tallying pending NOIs until actual lawsuits are filed.

III. MARINE SPECIES

We excluded from our summary information on marine species petitions submitted to the National Oceanic and Atmospheric Administration ("NOAA")–National Marine Fisheries Service ("NOAA Fisheries") because neither NOAA nor NOAA Fisheries were parties to the 2011 settlements. In our research, however, we found that since May 10, 2011, NOAA Fisheries received 26 petitions to list or uplist 155 species. Thus, on average, NOAA Fisheries receives petitions to list more than 3 species per month and more than 37 species per year.

Of these NOAA Fisheries petitions, CBD and WEG were responsible for nearly 57 percent of petitions submitted and more than 95 percent of the species petitioned.

Senator ROUNDS. Thank you for your testimony, Ms. Sgamma.

Our next witness is Mr. Andrew Grossman. Mr. Grossman, you may begin.

**STATEMENT OF ANDREW M. GROSSMAN, ASSOCIATE, BAKERHOSTETLER LLP; ADJUNCT SCHOLAR, CATO INSTITUTE**

Mr. GROSSMAN. Mr. Chairman, Ranking Member Markey, members of the Subcommittee, thank you for holding this hearing today and inviting me to testify.

My statement today will focus on both the EPA so-called Clean Power Plan, greenhouse gas regulations and the sue-and-settle phenomenon. Not only is the Clean Power Plan a product of collusive settlement with the environmentalist groups and pro-regulation States, but it also illustrates a broader class of problematic agency action that has serious implications for the rule of law in this country.

Sue-and-settle refers to a particular kind of collusion between agencies and outside groups who evade transparency and accountability mechanisms through friendly litigation and settlements. In a number of instances the Obama administration has chosen to enter into settlements that committed to taking action, often promulgating new regulations on a set schedule.

Between 2008 and June 2013, 14 of the 17 major non-discretionary rules issued by the EPA resulted from deadline lawsuits. The most recent example is the Clean Power Plan. EPA committed to regulate carbon dioxide emissions from the new and existing power plants under Section 111 of the Clean Air Act and in 2011 entered into a settlement with environmentalist groups and States. That settlement culminated in the signing of final rules this week.

We are all familiar with the problems that arise when settlements between agencies and special interests are used to set agency priorities and duties. These include lack of transparency, lack of public participation, rushed and sloppy rulemaking, and above all, the evasion of proper accountability and oversight. Fundamentally these are rule of law issues.

When an agency engages in legal chicanery to carry out its policy preferences, it undercuts the usual checks and balances that exist to promote moderation, pluralism and ultimately the public interest. This is not the only way the Clean Power Plan attempts to game the legal system. As many States pointed out after the rule was purposed, the rule's deep emission cuts and aggressive deadlines required State regulators to begin work on accommodating almost immediately. And that was a year ago.

At this moment, utility regulators in every affected State are hard at work evaluating the rule, attempting to mitigate its impact on their electric systems and making irreversible decisions on things like transmission projects and utility retirements and investments. None of these expenditures of time, efforts and money are recoupable. And few of those decisions can be reversed if and when the rule is ultimately struck down by the courts, which I believe it likely will be.

These concerns were brought to the EPA's attention and its response was to make the final rule's emission targets even more

stringent and to place greater emphasis on investment and renewable energy.

One can be forgiven for wondering whether the EPA strategy is to coerce its policy preferences into effect irrespective of its legal authority and before any court has the opportunity to stop it. After all, it was only a month ago that the Supreme Court held the EPA's Mercury Rule was unlawful after it had been in effect for over 3 years. As EPA Administrator Gina McCarthy explained to a talk show host, the decision would not have much of an impact, because most power plants are already in compliance and the investments required by the rule have already been made. Is it really so unreasonable for State officials and utilities who are being pushed to cut greenhouse gas emissions at breakneck speeds to wonder whether history is repeating itself with the Clean Power Plan?

The common thread that links collusive settlements and this kind of regulation by fiat is that they attempt to shortcut the ordinary give and take of representative government. Agencies use deadline settlements to achieve their policy priorities even when those priorities might not be shared by other agencies and actors in the executive branch or by Congress.

Likewise, the use of bureaucratic fiat can have the same effect, allowing agencies to achieve results that were never approved, in some cases were even specifically prohibited by Congress and to structure their actions to evade review by the courts. The administrative state is not supposed to work this way. But it is encouraging that Congress is paying attention to these issues and holding hearings like this one.

With respect to sue-and-settle, members of this body and the House have worked together to introduce the Sunshine for Regulatory Decrees and Settlements Act, thoughtful legislation that cuts to the heart of that issue. Other hearings and other pieces of legislation focus on the substance of deadline provisions themselves. There is a growing realization, I think, that more work will have to be done to rein in the agencies and to reassert Congress's policymaking primacy. This is a very important effort.

Again, I thank the Committee for the opportunity offer these remarks. I look forward to your questions.

[The prepared statement of Mr. Grossman follows:]

*Congressional Testimony*

# Oversight of Litigation at EPA and FWS: Impacts on the U.S. Economy, States, Local Communities and the Environment

Testimony before the Subcommittee on Superfund, Waste Management, and Regulatory Oversight of the Committee on Environment and Public Works, United States Senate

August 4, 2015

Andrew M. Grossman
Adjunct Scholar, Cato Institute
Associate, Baker & Hostetler LLP

**Summary of Testimony**

- EPA's "Clean Power Plan" to regulate power plants' greenhouse-gas emissions is a naked power grab. The agency lacks any statutory authority to regulate in this area at all. To justify proceeding, it has had to ignore a clear statutory prohibition on its action, ignore its own decades-old understanding of the scope of its statutory authority, and ignore Congress's judgment to allow states to retain their traditional policymaking authority over electricity markets and utilities. And to justify its approach, it has had to twist and contort the language of the Clean Air Act and coerce state action in violation of the Tenth Amendment.
- At every step of the way, EPA has relied on "sue and settle" tactics to facilitate its outrageous conduct. "Sue and settle" refers to agencies' use of legal challenges by friendly "foes" aimed at compelling government action that would otherwise be difficult or impossible to achieve.
- In 2011, EPA entered a settlement agreement with environmentalist groups and pro-regulation states committing the agency to propose and then finalize rules regulating carbon-dioxide emissions from new and existing power plants under Section 111 of the Clean Air Act. In private correspondence on the day the settlement was announced, the current EPA Administrator declared to a leader of one of the environmentalist groups that "[t]his success is yours as much as mine." In other words, the agency itself viewed the settlement less as a means of addressing legal claims against it than as a means of facilitating its regulatory agenda.
- Relying in part on the settlement agreement, EPA's proposed rule targeting existing power plants includes an aggressive timetable for implementation that requires states to begin major preparations now and is already affecting planning and investment decisions in the energy sector. At every stage, EPA's settlement obligations have been a convenient excuse for the agency to rush forward with its regulatory program—one of the most expensive and complex in American history.
- EPA's use of "sue and settle" to backstop its climate regulations is typical of the way it has used the tactic to drive other controversial regulation, including its Mercury and Air Toxics Standards ("MATS") rule for power plants and its "Brick MACT" rule.
- EPA's use of "sue and settle" here reinforces the need for the agency—or, barring that, Congress or the courts—to hit the "pause button" on this regulatory program. Agencies should not be allowed to use speed and coercion to will their policy preferences into force, irrespective of their legal authority.

My name is Andrew Grossman. I am an Adjunct Scholar at the Cato Institute and a litigator in the Washington, D.C., office of Baker & Hostetler LLP. The views I express in this testimony are my own and should not be construed as representing those of the Cato Institute, my law firm, or its clients.

What an agency lacks in statutory authority, it can often make up for with chicanery, urgency, and force. That is the basis of EPA's "Clean Power Plan" regulations for power plants' greenhouse-gas emissions. The chicanery here is a "sue and settle" legal settlement that the agency struck with its allies committing it to proceed with regulation and providing artificial urgency to do so. That artificial urgency, in turn, was key to push the regulations out the door, rush an incredibly complex and expensive rule through standard regulatory review processes, steamroll any potential political opposition, and put pressure on the states to begin compliance activities immediately. And that is how the agency has used force—requiring states to achieve massive emissions reductions at a breakneck pace—to coerce the states and utilities into action during the proposal stage, with the apparent intention to irreversibly alter investment and retirement decisions before any court has the opportunity to pass on the lawfulness of its actions.

This is not how the regulatory process is supposed to work in a country founded on the principles of the rule of law and federalism. It also raises serious concerns regarding the horizontal separation of powers. Congress, after all, is supposed to be the one making decisions of deep economic and political significance.

The focus of this hearing is the "sue and settle" phenomenon, which got this whole regulatory proceeding underway and continues to support the agency's drive. "Sue and settle" raises serious concerns about the conduct and resolution of litigation that seeks to set agency regulatory priorities and (in some instances) actually influences the content of those regulations. Since the House Judiciary Committee first directed its attention to the problem of collusive settlements in 2012,[1] there have been a myriad of hearings and reports focusing on this problem, as well as the introduction of legislation to construc-

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[1] *See generally* The Use and Abuse of Consent Decrees in Federal Rulemaking: Hearing before the Subcommittee on the Courts, Commercial and Administrative Law, Committee on the Judiciary, United States House of Representatives, 112th Congress (Feb. 3, 2012), *available at* http://judiciary.house.gov/_files/hearings/Hearings%202012/Grossman%2002032012.pdf (written testimony of Andrew M. Grossman, Visiting Legal Fellow, The Heritage Foundation) [hereinafter "2012 Testimony"].

tively address it. This is heartening. But the response from some in government and from the outside groups that pursue settlements has not been to debate the merits or discuss solutions, but simply to assert that there is no problem and that litigation brought for the very purpose of setting agency priorities has no real impact. That is not so. Recent examples show that the problem is real, it is serious, and it is, if anything, getting worse. Based on precedent and the incentives faced by agencies in the waning months of a presidency, there is a real risk over the next year and a half that the current administration may attempt to employ collusive settlements and consent decrees to bind its successor. Continued oversight by this subcommittee and those with jurisdiction over the relevant agencies will be crucial in the months ahead.

Congress and legal experts have given considerable thought on how to alter the incentives and the legal environment that facilitate collusive settlements. Over the past three years, Members of the House and Senate have developed several bills that seek to carry out the principles identified in my 2012 testimony on abuses of settlements and consent decrees. The most comprehensive of those bills, the Sunshine for Regulatory Decrees and Settlements Act, passed the House in the previous Congress, and (as reintroduced this Congress) has drawn strong support in the Senate. Although there is little prospect that any substantial regulatory reforms will become law in this Congress—why would the President sign a bill abolishing a technique that has proven so useful to his administration?—now is the time to lay the intellectual and political groundwork for an aggressive first-one-hundred-days regulatory reform agenda for the next administration.

## I. An Overview of "Sue and Settle"

Typically, the federal government vigorously defends itself against lawsuits challenging its actions. But not always. Sometimes regulators are only too happy to face collusive lawsuits by friendly "foes" aimed at compelling government action that would otherwise be difficult or impossible to achieve. In a number of cases brought by activist groups, the Obama Administration has chosen instead to enter into settlements that commit it to taking action, often promulgating new regulations, on a set schedule. While the "sue and settle" phenomenon is not new, dating back to the broad "public interest" legislation of the 1960s and 1970s, what is new is the frequency with which generally applicable regulations, particularly in the environmental sphere, are being promulgated according to judicially enforceable consent decrees struck in settlement. The EPA alone entered into more than sixty such settlements be-

tween 2009 and 2012, committing it to publish more than one hundred new regulations, at a cost to the economy of tens of billions of dollars.[2]

In the abstract, settlements serve a useful, beneficial purpose by allowing parties to settle claims without the expense and burden of litigation. But litigation seeking to compel the government to undertake future action is not the usual case, and the federal government is not the usual litigant. Consent decrees and settlements that bind the federal government present special challenges that do not arise in private litigation. This happens in all manner of litigation, and is not confined to a particular subject matter. Settlements binding federal actors have been considered in cases concerning environmental policy, civil rights, federal mortgage subsidies, national security, and many others. Basically, settlements may become an issue in any area of the law where federal policymaking is routinely driven by litigation.

But they are especially prevalent in environmental law, due to the breadth of the governing statutes, their provisions authorizing citizen suits, and the great number of duties those statutes arguably impose on the relevant agencies.

## II. Implications for Democratic Governance and Accountability

Judge Frank Easterbrook provides a compelling account of the ways that government officials may use consent decrees to obtain advantage—over Congress, over successors, over other Executive Branch officials—in achieving their policy goals:

> The separation of powers inside a government—and each official's concern that he may be replaced by someone with a different agenda—creates incentives to use the judicial process to obtain an advantage. The consent decree is an important element in the strategy. Officials of an environmental agency who believe that the regulations they inherited from their predecessors are too stringent may quickly settle a case brought by industry (as officials who think the regulations are not stringent enough may settle a case brought by a conservation group). A settlement under which the agency promulgated new regulations would last only for the duration of the incumbent official; a successor with a different view could promulgate a new regulation. Both parties to the litigation therefore may want a judicial decree that ties the hands of the successor. It is impossible for an agency to promulgate a regulation containing a clause such as "My successor cannot amend this regulation." But if the clause appears in a consent decree, perhaps the administra-

[2] U.S. Chamber of Commerce, Sue and Settle: Regulating Behind Closed Doors (2013), at 14.

> tor gets his wish to dictate the policies of his successor. Similarly, officials of the executive branch may obtain leverage over the legislature. If prison officials believe their budget is too small, they may consent to a judgment that requires larger prisons, and then take the judgment to the legislature to obtain the funds.[3]

The abuse of consent decrees in regulation raises a number of practical problems that reduce the quality of policymaking actions and undermine representative government. In general, public policy should be made in public, through the normal mechanisms of legislating and administrative law and subject to the give-and-take of politics. When, for reasons of convenience or advantage, public officials attempt to make policy in private sessions between government officials and (as is often the case) activist groups' attorneys, it is the public interest that suffers. Experience demonstrates at least five specific consequences that arise when the federal government regulates pursuant to a consent decree or settlement:

- **Special-Interest-Driven Priorities**. Settlements can undermine presidential control of the executive branch, empowering activists and subordinate officials to set the federal government's policy priorities. Regulatory actions are subject to the usual give-and-take of the political process, with Congress, outside groups, and the public all influencing an administration's or an agency's agenda, through formal and informal means. These include, for example, congressional policy riders or pointed questions for officials at hearings; petitions for rulemaking filed by regulated entities or activists; meetings between stakeholders and government officials; and policy direction to agencies from the White House. Especially when they are employed collusively, consent decrees short-circuit these political processes. In this way, agency officials can work with outside groups to force their agenda in the face of opposition—or even just reluctance, in light of higher priorities—from the White House, Congress, and the public. When this happens, the public interest—as distinct from activists' or regulators' special interests—may not have a seat at the table as the agency reorganizes its agenda by committing to take particular regulatory actions at particular times, in advance or to the exclusion of other rulemaking activities that may be of greater or broader benefit.
- **Rushed Rulemaking**. The public interest may also be sacrificed when officials use settlements to accelerate the rulemaking process by insulating it from political pressures that may reasonably require an agency

[3] Frank Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. Chi. L. Forum 19, 33–34 (1987).

to achieve its goals at a more deliberate speed. In this way, officials may gain an advantage over other officials and agencies that may have competing interests, as well as over their successors, by rushing out rules that they otherwise may not have been able to complete or would have had to scale back in certain respects.

In some instances, aggressive deadlines contained within settlements, as was the case with EPA's Mercury Rule, may provide the agency with a practical excuse (albeit not a legal excuse) to play fast and loose with the Administrative Procedure Act and other procedural requirements, reducing the opportunity for public participation in rulemaking and, substantively, likely resulting in lower-quality regulation. Although a settlement deadline does not excuse an agency's failure to observe procedural regularities, courts are typically deferential in reviewing regulatory actions and are reluctant to vacate rules tainted by procedural irregularity in all but the most egregious cases, where agency misconduct and party prejudice are manifest. In practical terms, members of the public and regulated entities whose procedural rights are compromised by overly aggressive settlement schedules can rarely achieve proper redress.

- **Practical Obscurity**. Settlements and consent decrees are often faulted as "secret regulation," because they occur outside of the usual process designed to guarantee public notice and participation in policymaking.[4] As one recent article argues, "[W]hen the government is a defendant, the public has an important interest in understanding how its activities are circumscribed or unleashed by a decree," but too often these settlements are not subject to any public scrutiny.[5] And even when the public is technically provided notice, that notice may be far less effective than would ordinary be required under the Administrative Procedure Act. The result is that the agency may make very serious policy determinations that affect the rights of third parties without subjecting its decisionmaking process to the public scrutiny and participation that such an action would otherwise entail. This is so despite the fact that a settlement or consent decree may be more binding on an

[4] *See, e.g.*, Margo Schlanger, *Against Secret Regulation: Why and How We Should End the Practical Obscurity of Injunctions and Consent Decrees*, 59 DePaul L. Rev. 515 (2010). Such concerns may be overblown, however, when they concern settlements between private parties or settlements with the government that predominantly affect private rights.

[5] *Id.* at 516.

agency than a mere regulation, which it may alter or abandon without a court's permission.

- **Eliminating Flexibility**. Abusive settlements may reduce the government's flexibility to alter its plans and to select the best policy response to address any given problem. The Supreme Court has recently clarified that agencies need not provide any greater justification for a change in policy than for adopting a new policy, recognizing the value of flexibility in administering the law.[6] It is unusual, then, that when an agency acts pursuant to a settlement, it has substantially less discretion to select other means that may be equally effective in satisfying its statutory or constitutional obligations. In effect, settlements have the potential to "freeze the regulatory processes of representative democracy."[7] This is what the Reagan Administration learned when it entered office to find that its predecessor had already traded away its ability to adopt new approaches and respond to changing circumstances.[8]

- **Evading Accountability**. What the preceding points share in common is that they all serve to reduce the accountability of government officials to the public. The formal and informal control that Congress and the President wield over agency officials is hindered when they act pursuant to settlements and consent decrees. Their influence is replaced by that of others:

> Government by consent decree enshrines at its very center those special interest groups who are party to the decree. They stand in a strong tactical position to oppose changing the decree, and so likely will enjoy material influence on proposed changes in agency policy. Standing guard over the whole process is the court, the one branch of our government which is by design least responsive to democratic pressures and least fit to accommodate the many and varied interests affected by the decree. The court can neither effectively negotiate with all the parties affected by the decree, nor ably balance the political and technological trade-offs involved. Even the best-intentioned and most vigilant court will prove insti-

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[6] *FCC v. Fox Television Stations*, 129 S. Ct. 1806 (2009).

[7] *Citizens for a Better Envt. v. Gorsuch*, 718 F. 2d 1117, 1136 (D.C. Cir. 1983) (Wilkey, J., dissenting).

[8] *See* 2012 Testimony, supra n.1, at 6–10.

tutionally incompetent to oversee an agency's discretionary actions.[9]

## III. The High Costs of Sue and Settle: Recent Examples

By design, sue and settle facilitates expensive, burdensome rules. First, as described above, it allows agency officials to evade political accountability for their actions by genuflecting to a judicially enforceable consent decree that mandates their action. As a result, officials face less pressure to moderate their approaches to regulation or to consider less burdensome alternatives. This, in turn, presents the risk of collusion and still more-burdensome rules that would be politically untenable but for a consent decree. Second, due to skirting of the notice-and-comment procedure, officials may not even be aware of alternatives. Third, even when alternatives do present themselves, officials may lack the time to analyze and consider them—assuming, of course, that alternative approaches are not barred altogether by one or another provision of the consent decree. In sum, it may be expected that the rules resulting from consent-decree settlements will be, on the whole, less efficient, more burdensome, and more expensive than those adopted through the normal rulemaking process.

This has been borne out in recent practice:

- **EPA's Existing Source Performance Standards for Power Plants.** EPA committed to regulate carbon dioxide emissions from new and existing power plants under Section 111 of the Clean Air Act in a 2011 agreement with environmentalist groups and states.[10] The settlement provides that EPA "will" propose "emissions guidelines for GHGs from existing [power plants]" and will promulgate "a final rule that takes final action with respect to the proposed rule," despite considerable doubt as to the agency's legal authority to regulate at all. In particular, Section 111(d) prohibits EPA from regulating the emission of "any air pollutant...emitted from a source category which is regulated under section [112]," which (following EPA's Mercury Rule) power plants are.[11] On the day the settlement was announced, David Doniger, policy director of the Natural Resources Defense Counsel, emailed Regina McCarthy, then-Assistant Administrator for EPA's Office of Air and Radiation and now EPA Administrator, to congratulate her, calling the settlement "a major achievement."[12] McCarthy re-

[9] *Id.* at 1136–37.

[10] Settlement Agreement ¶¶ 1–4, EPA-HQ-OGC-2010-1057-0002.

[11] 42 U.S.C. § 7411(d)(1).

[12] Email from David Doniger to Regina A. McCarthy (Dec. 23, 2010, 6:30 pm EST).

turned the compliment, saying, "[t]his success is yours as much as mine."[13]

Relying in part on the settlement agreement, EPA's proposal included an aggressive timetable for implementation that requires states to begin major preparations now and is already affecting planning and investment decisions in the energy sector.[14] According to reports, EPA's final rule mirrors its proposal, with no legally material changes. Even so, it will take months—possibly as long as two years from the release of the initial proposal—for the courts to even preliminarily review EPA's very questionable exertion of authority. In the meanwhile, states and utilities are being forced to make decisions regarding plant upgrades and retirements, the construction of new capacity as required by the regulation, new transmission capacity, and state legal authority. One might have expected these kinds of issues to be aired and addressed during the regulatory review process, but it was extremely abbreviated compared to that for rules of similar complexity and importance—another likely consequence of the settlement agreement's false urgency.

In short, whether or not EPA is ultimately found to have authority to regulate existing power plants—a challenge to any final rule is inevitable—the agency will have used the settlement agreement to achieve much of what it sought to do: force the retirement of coal-fired generation.[15]

- **EPA's Mercury Rule**. My 2012 testimony describes the American Nurses litigation that resulted in a consent decree requiring EPA to

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[13] Email from Regina A. McCarthy to David Doniger (Dec. 23, 2010, 8:19 pm EST).

[14] 79 Fed. Reg. 34,830 (June 18, 2014).

[15] *See generally* David B. Rivkin, Jr., Mark DeLaquil, and Andrew Grossman, Does EPA's Clean Power Plan Proposal Violate the States' Sovereign Rights?, *Engage*, June 15, 2015, *available at* http://www.fedsoc.org/publications/detail/does-epas-clean-power-plan-proposal-violate-the-states-sovereign-rights. *See also* Comment from the Attorneys General of the States of Oklahoma, West Virginia, Nebraska, Alabama, Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, Montana, North Dakota, Ohio, South Carolina, South Dakota, Utah and Wyoming on Proposed EPA Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Docket ID No. EPA–HQ–OAR–2013–0602, *available at* http://www.ok.gov/oag/documents/EPA%20Comment%20Letter%20111d%2011-24-2014.pdf.

propose one of its most complex and expensive rules ever in a matter of months.[16] Since the rule was finalized, it has been amended and corrected on multiple occasions and reconsidered by the agency in numerous respects.[17] The most recent corrections were proposed in February of this year—*three years* after the rule was finalized.[18] The legal challenges to it have been divided into a number of different proceedings, with one—alleging that in its haste EPA failed to properly consider the cost of its actions—currently before the Supreme Court.[19] Whether or not the Court ultimately vacates the rule, these events demonstrate the high costs, in terms of legal and regulatory uncertainty, of the compressed timetables that can result from agency settlements.

- **EPA's Brick MACT Rule**. A consent decree entered to settle a lawsuit that the Sierra Club brought against the EPA committed the agency to propose and finalize National Emissions Standards for Hazardous Air Pollutants for brick manufacturers on an aggressive timetable. That rule was subject to a lengthy reconsideration and then ultimately vacated, and EPA (pursuant to another consent decree with the Sierra Club) has proposed a replacement that the agency estimates will be substantially more expensive and that may impose new compliance obligations on sources that already made substantial expenditures to comply with the first rule. In testimony before this Subcommittee, the President of the Columbus Brick Company, a small business in Columbus, Mississippi, explained that his industry was excluded from settlement discussions regarding timing issues and that the agency lacks the time to consider flexible alternatives that may ease compliance burdens.[20]
- **Endangered Species Listing**. In two settlements executed in September 2011, the Fish and Wildlife Service agreed to make listing determinations for 251 species by September 2016 in an order negotiated with

[16] 2012 Testimony, supra n.1, at 10–12.

[17] William Yeatman, This Month in Sue and Settle, Feb. 19, 2015, http://www.globalwarming.org/2015/02/19/this-month-in-sue-and-settle/.

[18] 80 Fed. Reg. 8,442 (Feb. 17, 2015).

[19] *Michigan v. Environmental Protection Agency*, No. 14-46.

[20] Hearing on H.R. 1493, the "Sunshine for Regulatory Decrees and Settlements Act of 2013," June 5, 2013 (written testimony of Allen Puckett III), *available at* http://judiciary.house.gov/_files/hearings/113th/06052013/Puckett%20060 52013.pdf.

two environmentalist groups, Wildearth Guardians and Center for Biological Diversity.[21] In so doing, the agency abandoned its statutory authority to determine that an endangerment finding is warranted, but precluded by higher listing priorities—a status that allows public agencies, private landowners, and other interested parties to take actions to reduce threats and gather data so as to reduce the likelihood of a listing or, at the least, to undertake long-range planning with awareness of possible listings.[22] Rather than rely on the best available science and its own judgment to set priorities in an open and transparent manner, the agency instead deferred to these private parties, both in the timing and the substance (by excluding "warranted but precluded" determinations) of its decisions.

Some would wave away these examples—as well as those in my 2012 testimony and 2014 Heritage Foundation monograph[23]—as saying little about the impact of settlement agreements. On the facts, that is a difficult position to maintain. Each of these examples illustrates how settlements can affect agency priorities and, in certain instances, the substance of their decisions. Even a recent Government Accountability Office report that claimed, based on comments by EPA staff, that settlements have only a "limited" impact on EPA rulemaking recognized that they do "affect the timing and order in which rules are issued"—in other words, the agency's priorities.[24] With statutes as capacious as the Clean Air Act and Endangered Species Act, agency priorities determine the regulatory agenda.

Agency priorities are particularly important now, in the waning days of the Obama presidency. This administration has been aggressive in the pursuit of its policy goals through non-legislative means, upsetting settled understand-

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[21] Stipulated Settlement Agreement re Wildearth Guardians, *In re Endangered Species Act Section 4 Deadline Litigation*, No. 10-377 (D.D.C.); Stipulated Settlement Agreement re Center for Biological Diversity, *In re Endangered Species Act Section 4 Deadline Litigation*, No. 10-377 (D.D.C.).

[22] *See generally* 16 U.S.C. § 1533; Endangered and Threatened Wildlife and Plants; Review of Native Species That Are Candidates for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions, 76 FR 66369, 66370–71 (Oct. 26, 2011) (describing listing process).

[23] Andrew M. Grossman, Regulation Through Sham Litigation: The Sue and Settle Phenomenon, Heritage Foundation Legal Memorandum No. 110, Feb. 25, 2014.

[24] U.S. Government Accountability Office, Impact of Deadline Suits on EPA's Rulemaking Is Limited, December 2014.

ings regarding executive power and statutory constructions to implement policies that it has been unable to convince Congress to enact.[25] The agency officials responsible for carrying out this agenda have every incentive to attempt to force it on their successors through the use of settlements and consent decrees. There is precedent: in its final months, the Carter Administration entered into settlements that served to tie the hands of Reagan Administration officials on major policy question, including construction of public works, issuance of environmental regulations targeting particular industries, and education funding, among others.[26] Vigorous oversight is necessary to ensure that the next administration, which may have very different priorities than this one, is not stymied in its ability to exercise its policy discretion and is not bound by its predecessor's unwise policy choices.

## IV. Opportunities for Reform

Congress can and should adopt certain common-sense policies that provide for transparency and accountability in settlements and consent decrees that compel future government action. Any legislation that is intended to address this problem in a comprehensive fashion should include the following features, with respect to settlements that commit the government to undertake future action that affects the rights of third parties:

- **Transparency**. Proposed settlements should be subject to the usual notice and comment requirements, as is generally the case under the Clean Air Act.[27] To aid Congress and the public in its understanding of this issue, agencies should be required to make annual reports to Congress on their use of settlements. In addition, Treasury should be re-

[25] *See generally* Examining the Proper Role of Judicial Review in the Regulatory Process: Hearing before the Senate Subcommittee on Regulatory Affairs and Federal Management of the Committee on Homeland Security and Governmental Affairs, Apr. 28, 2015 (written testimony of Andrew M. Grossman), at 22–25, available at http://object.cato.org/sites/cato.org/files/pubs/pdf/grossman_-_judicial_review_testimony.pdf (describing aggressive statutory interpretations under the Obama Administration)

[26] *See* 2012 Testimony, supra n.1, at 6–10.

[27] Clean Air Act § 113(g), 42 U.S.C. § 7413(g). Note that this provision, however, does not require EPA to respond to comments, only that, "as appropriate," it "shall promptly consider" them.

quired to report the details of cases that result in payments by the Judgment Fund.[28]

- **Robust Public Participation**. As in any rulemaking, an agency or department should be required to respond to the issues raised in public comments on a proposed settlement, justifying its policy choices in terms of the public interest; failure to do so would prevent the court from approving the consent decree. These comments, in turn, would become part of the record before the court. Parties who would have standing to challenge an action taken pursuant to a settlement should have the right to intervene in a lawsuit where one may be lodged. As described below, these interveners should have the right to demonstrate to the court that a proposed settlement is not in the public interest.
- **Sufficient Time for Rulemaking**. The agency should bear the burden of demonstrating that any deadlines in the proposed decree will allow it to satisfy all applicable procedural and substantive obligations and further the public interest.
- **A Public Interest Standard**. Especially for settlements that concern future rulemaking, those parties in support of the settlement should bear

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[28] To that end, the Judgment Fund Transparency Act, H.R. 1669, would require Treasury to publish the following for each disbursement from the Judgment Fund:

> (1) The name of the specific Federal agency or entity whose actions gave rise to the claim or judgment.
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> (2) The name of the plaintiff or claimant.
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> (3) The name of counsel for the plaintiff or claimant.
>
> (4) The amount paid representing principal liability, and any amounts paid representing any ancillary liability, including attorney fees, costs, and interest.
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> (5) A brief description of the facts that gave rise to the claim.
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> (6) A copy of the original or amended complaint or written claim, and any written answer given by the Federal Government to that complaint or claim.
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> (7) A copy of the final action by a court regarding the claim (whether by decree, approval of settlement, or otherwise), or of the settlement agreement in any action not involving a court.
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> (8) The name of the agency that submitted the claim.

A companion bill, S. 350, has been introduced in the Senate.

the burden of demonstrating that it is in the public interest. In particular, they should have to address (1) how the proposed settlement would affect the discharge of other uncompleted nondiscretionary duties; and (2) why taking the regulatory actions required under the settlement, to the delay or exclusion of other actions, is in the public interest. The court, in turn, before ruling on the motion to enter the settlement, would have to "satisfy itself of the settlement's overall fairness to beneficiaries and consistency with the public interest."[29]

- **Accountability**. Before the government enters into a settlement that affects the rights of third parties, the Attorney General or agency head (for agencies with independent litigating authority) should be required to certify that he has reviewed the decree's terms, found them to be consistent with the prerogatives of the Legislative and Executive Branches, and approves them. In effect, Congress should implement the Meese Policy,[30] consistent with the Executive Branch's discretion, by requiring accountability when the federal government enters into consent decrees or settlements that cabin executive discretion or require it to undertake future actions.
- **Flexibility**. Finally, Congress should act to ensure that settlements do not freeze into place a particular official's or administration's policy preferences, but afford the government reasonable flexibility, consistent with its constitutional prerogatives, to address changing circumstances. To that end, if the government moves to terminate or modify a settlement or consent decree on the grounds that it is no longer in the public interest, the court should review that motion *de novo*, under the public interest standard articulated above.

These principles are reflected in the Sunshine for Regulatory Decrees and Settlements Act, H.R. 712 and S. 378. That bill represents a leap forward in transparency, requiring agencies to publish proposed settlements before they are filed with a court and to accept and respond to comments on proposed settlements. It also requires agencies to submit annual reports to Congress identifying any settlements that they have entered into. The bill loosens the standard for intervention, so that parties opposed to a "failure to act" lawsuit may intervene in the litigation and participate in any settlement negotiations. Most substantially, it requires the court, before approving a proposed consent decree or settlement, to find that any deadlines contained in it allow for the

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[29] *United States v. Trucking Employers, Inc.*, 561 F.2d 313, 317 (D.C. Cir. 1977) (internal quotation marks and citation omitted).

[30] Memorandum from Edwin Meese III Regarding Department Policy Regarding Consent Decrees and Settlement Agreements, Mar. 13, 1986.

agency to carry out standard rulemaking procedures. In this way, the federal government could continue to benefit from the appropriate use of settlements and consent decrees to avoid unnecessary litigation, while ensuring that the public interest in transparency and sound rulemaking is not compromised.

Other proposed legislation focuses on settlements under specific statutory regimes. For example, the Endangered Species Act (ESA) Settlement Reform Act[31] would amend the ESA to provide, in cases seeking to compel the Fish and Wildlife Service to make listing determinations regarding particular species, many of the procedural reforms contained in the Sunshine for Regulatory Decrees and Settlements Act, such as broadening intervention rights to include affected parties and allowing them to participate in settlement discussions. In addition, as particularly relevant in this kind of litigation, the bill would require that notice of any settlement be given to each state and county in which a species subject to the settlement is believed to exist and gives those jurisdictions a say in the approval of the settlement. In effect, this proposal would return discretion for the sequencing and pace of listing determinations under the ESA to the Fish and Wildlife Service, which would once again be accountable to Congress for its performance under the ESA.

Similarly, the Reducing Excessive Deadline Obligations Act of 2013,[32] which was introduced in the last Congress and passed the House, would have amended the Resource Conservation and Recovery Act to remove a nondiscretionary duty that EPA review and, if necessary, revise all current regulations every three years and the Comprehensive Environmental Response Compensation and Liability Act to remove a 1983 listing deadline that has never been fully satisfied.[33] The effect of these amendments would have been to reduce the opportunity for citizen suits seeking to set agency priorities under these obsolete provisions.

These bills suggest that, rather than proceeding in a piecemeal fashion, Congress may wish to consider a more comprehensive approach that limits the ability of third parties to compel Executive Branch action. Suing to compel an agency to act on a permit application or the like is different in kind from seeking to compel it to issue generally applicable regulations or take action against third parties. As Justice Anthony Kennedy has observed, "Difficult and fundamental questions are raised" by citizen-suit provisions that give private litigants control over actions and decisions (including the setting of agency priorities) "committed to the Executive by Article II of the Constitu-

[31] H.R. 585; S. 293.

[32] H.R. 2279 (113th Cong.).

[33] *See generally* Reducing Excessive Deadline Obligations Act of 2013, House Report 113-179 (113th Cong.).

tion of the United States."[34] Constitutional concerns aside, at the very least, the ability to compel agency action through litigation and settlements gives rise to the policy concerns identified above, suborning the public interest to special interests and sacrificing accountability.

The sue-and-settle phenomenon is facilitated by the combination of broad citizen-suit provisions with unrealistic statutory deadlines that private parties may seek enforced through citizen suits. According to William Yeatman of the Competitive Enterprise Institute, "98 percent of EPA regulations (196 out of 200) pursuant to [Clean Air Act] programs were promulgated late, by an average of 2,072 days after their respective statutorily defined deadlines."[35] Furthermore, "65 percent of the EPA's statutorily defined responsibilities (212 of 322 possible) are past due by an average of 2,147 days."[36] With so many agency responsibilities past due, citizen-suit authority allows special-interest groups (whether or not in collusion or philosophical agreement with the agency) to use the courts to set agency priorities. Not everything can be a priority, and by assigning so many actions unrealistic and unachievable non-discretionary deadlines, Congress has inserted the courts into the process of setting agency priorities, but without providing them any standard or guidance on how to do so. It should be little surprise, then, that the most active repeat players in the regulatory process—the agency and environmentalist groups—have learned how to manipulate this situation to advance their own agendas and to avoid, as much as possible, accountability for the consequences of so doing.

Two potential solutions suggest themselves. First, a deadline that Congress does not expect an agency to meet is one that ought not to be on the books. If Congress wants to set priorities, it should do so credibly and hold agencies to those duties through oversight, appropriations, and its other powers. In areas where Congress has no clear preference as to timing, it should leave the matter to the agencies and then hold them accountable for their decisions and performance. What Congress should not do is empower private parties and agencies to manipulate the litigation process to set priorities that may not reflect the public interest while avoiding the political consequences of

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[34] *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring).

[35] William Yeatman, EPA's Woeful Deadline Performance Raises Questions about Agency Competence, Climate Change Regulations, "Sue and Settle," July 10, 2013, http://cei.org/sites/default/files/William%20Yeatman%20-%20EPA%27s%20Woeful%20Deadline%20Performance%20Raises%20Questions%20About%20Agency%20Competence.pdf.

[36] *Id.*

those actions. To that end, Congress should seriously consider abolishing all mandatory deadlines that are obsolete and all recurring deadlines that agencies regularly fail to observe.[37]

Second, Congress should consider narrowing citizen-suit provisions to exclude "failure to act" claims that seek to compel the agency to consider generally applicable regulations or to take actions against third parties. As a matter of principle, these kinds of decisions regarding agency priorities should be set by government actors who are accountable for their actions, not by litigants and not through abusive litigation.

## V. Conclusion

Settlements that govern the federal government's future actions raise serious constitutional and policy questions and are too often abused to circumvent normal political process and evade democratic accountability. Congress can and should address this problem to ensure that such consent decrees are employed only in circumstances where they advance the public interest, as determined by our public institutions, not special interests.

I thank the subcommittee for the opportunity to testify on these important issues.

[37] One commentator endorses allowing agencies to set their own non-binding deadlines, subject to congressional oversight. Alden F. Abbott, The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal, 39 Admin. L. Rev. 171, 200–02 (1987).

My name is Andrew Grossman. I am an Adjunct Scholar at the Cato Institute and a litigator in the Washington, D.C., office of Baker & Hostetler LLP. The views I express in these responses to questions for the record are my own and should not be construed as representing those of the Cato Institute, my law firm, or its clients.

Responses to the questions submitted by Senator Inhofe follow:

**Are unrealistic Clean Air Act deadlines providing leverage for environmental groups to sue EPA for missed deadlines then set EPA's regulatory priorities through sue-and-settle?**

Yes, the Clean Air Act and other statutes administered by EPA contain large numbers of mandatory deadlines that the agency is incapable of meeting and that, in all likelihood, Congress does not intend the agency to meet, given the economic impact of such a regulatory tidal wave. The presence of these mandatory deadlines, however, does provide leverage for outside groups to bring suit so as to influence EPA's regulatory priorities by pressuring or compelling it to take particular regulatory actions instead of, or sooner than, others.

**Sue-and-settle shuts out states, regulated entities, and the public from the process. At least under the Clean Air Act, the public has 30 days to comment on a proposed settlement agreement, but is that meaningful public participation?**

While a 30-day comment period may be better than nothing, it still does not provide adequate opportunities for participation by parties who may be affected by regulatory actions undertaken pursuant to settlements. For example, consider a settlement that commits EPA to undertake regulatory action by a certain deadline, when that action would otherwise not have been undertaken or would have proceeded on a different schedule. The agency may use that settlement obligation to steamroll opposition from Congress and within the executive branch, and to avoid giving appropriate consideration to alternative regulatory approaches proposed by stakeholders. In this way, a collusive settlement can aggrandize the agency's power. In such a scenario, writing a comment to the agency is not likely to be an effective means of altering a settlement that is favored by the agency but is not ultimately in the public interest.

**Your written testimony mentioned that settlements can serve to tie the hands of the next administration; can you highlight how this could be problematic if the next President would like to undo EPA's climate rules?**

Agencies have used settlements and consent decrees to tie the hands of their successors in subsequent administrations. For example, in September 1980, the Carter Administration's Department of Justice and Chicago's public

school system entered into a consent decree that required the federal government "to make every good faith effort to find and provide every available form of financial resources [sic] adequate for the implementation of the desegregation plan."[1] In other cases, the Carter Administration entered into settlements prohibiting certain water development projects and requiring EPA to promulgate numerous regulations regarding water discharges. The Obama Administration similarly took advantage of settlements to rush out rules regulating carbon-dioxide emissions faster than it otherwise might have been able, with the intent of changing the facts on the ground before the next administration takes office. Whether it is able to accomplish that task, and create legal scaffolding around its rules so that they are difficult for a successor administration to displace them, remains to be seen.

Part of this process, as the Senator's question suggests, is implementing unusually stringent and expensive standards while, at the same time, providing compliance extensions to the most affected sources so as to diffuse opposition. The apparent purpose of this technique is to control the long-term glide path of regulatory requirements, rather than leave decisions regarding future compliance obligations to future administrations, as has traditionally been done.

**Can you explain how a lawsuit against an agency for failure to perform a non-discretionary duty, such as missing a statutory deadline, can result in a settlement agreement where the agency agrees to take discretionary action?**

In some instances, an agency may agree not only to undertake some non-discretionary action, but to do so in a way that affects the substance of the action, including in ways that would otherwise be discretionary to the agency. This may include timing considerations, the administrative process, or even aspects of the substance of the action itself, such as scope. Unlike with settlements among private parties, this kind of settlement can actually serve to empower the agency, by giving it a "trump" over other government actors, including Congress in its oversight capacity.

**Isn't it true that negotiated deadlines for rules are frequently so fast and ambitious that little time is left for interagency review by the Office of Information and Regulatory Affairs (OIRA) and the Small Business Administration's Office of Advocacy?**

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[1] *United States v. Bd. of Educ. of Chicago*, 744 F.2d 1300 (1984). While, technically, the settlement was to resolve civil rights claims brought by the federal government against the school system, it also committed the federal government to taking action. For that reason, despite its unusual posture, the settlement raises the same concerns as other "sue and settle" cases.

**If interagency review process strengthens the quality of rules, does arbitrarily rushing that process to meet settlement deadlines undermine the quality of rulemaking?**

**By agreeing to short deadlines in settlement agreements, are agencies less likely to consider regulatory alternatives as required by Executive Order 12866?**

Sound rulemaking takes time, and this is true nowhere more than in the area of environmental regulation, where complexity is the norm and agencies face large numbers of alternative potential approaches. Congress has identified certain overriding considerations, and directed agencies to consider them carefully, in such laws as the Unfunded Mandates Reform Act, the Regulatory Flexibility Act, and the Paperwork Reduction Act. Other important considerations and best practices, such as the consideration of more efficient alternatives, are identified in Executive Order 12866 and related publications. Some agencies see these things as procedural speedbumps that only slow down the achievement of their regulatory goals. But taken in the spirit in which they were enacted, these procedural mechanisms seek to foster sound rulemaking and are most important in areas where an agency might otherwise rush, fail to consider alternative approaches, or give short shrift to considerations that are important to the broader public interest. Rushing out rules through settlements with aggressive deadlines may help an agency to achieve its political goals, but doing so directly detracts from the public-interest goals identified by Congress and the Executive Branch. No one wants to impose unnecessary delay in regulatory processes, but the costs of undue haste may be even greater.

**Your testimony mentions how sue-and-settle coerces states into action during proposal stage, are you saying that no matter what efforts EPA seeks to reverse a final rule, the impact on states may be irreversible?**

By setting aggressive regulatory deadlines in programs that are largely administered by the states—including many Clean Air Act and Clean Water Act programs—collusive settlements can serve to coerce states into action before the issuance of a final rule. This appears to be the case with EPA's "Clean Power Plan" performance standards for existing power plants, which was undertaken pursuant to a settlement with states and environmentalist groups. Although final standards have yet to be promulgated, states have already begun to undertake compliance measures, aware that waiting for finalization of the rule would not leave them sufficient time to address its impact on electricity generation and transmission. States' expenditures of resources in these efforts are unrecoverable, and the decisions that they make—including those related to investment in power infrastructure and to state agencies' legal

authority—may be difficult or impossible to reverse. The real problem, in this particular instance, is EPA's use of a proposed rule to announce requirements that cannot be met or accommodated on the proposed schedule; the underlying settlement agreement served to facilitate the agency's haste.

**How do consent decrees allow political officials to disclaim responsibility for agency actions that are unpopular?**

Collusive settlements and consent decrees empower agency officials to undertake actions that are unpopular or subject to strong political opposition without having to bear the full costs of so doing—in other words, they get to pass the buck to the settlement. For example, in the normal course of governmental affairs, officials of an agency that has proposed an unduly burdensome regulatory program would have to justify that decision, on the merits, before Congress and to other executive branch officials who may have competing priorities—for example, economic growth. But a settlement obviates the need to do so; officials can simply explain that they are doing what is legally required—even if, as a practical matter, the agency may have had some flexibility prior to the settlement to ease the burden of the proposed action. In this way, settlements can undermine agency accountability.

**Sue-and-settle is often the result of a lawsuit brought against an agency that is unwilling to challenge the suit in court. Your written testimony mentions the EPA's mercury rule and greenhouse gas rules, as well as the FWS "mega-settlement" over ESA designations. Do you think EPA and FWS should have challenged these cases in court, rather than settle?**

At the end of the day, the best means to address the "sue and settle" phenomenon is for Congress to reform unrealistic statutory deadlines and take control itself of agency priorities. A deadline that Congress does not expect an agency to meet is one that ought not to be on the books. If Congress wants to set priorities, it should do so credibly and hold agencies to those duties through oversight, appropriations, and its other powers. In areas where Congress has no clear preference as to timing, it should leave the matter to the agencies and then hold them accountable for their decisions and performance. What Congress should not do is empower private parties and agencies to manipulate the litigation process to set priorities that may not reflect the public interest while avoiding the political consequences of those actions. To that end, Congress should seriously consider abolishing all mandatory deadlines that are obsolete and all recurring deadlines that agencies regularly fail to observe.[2]

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[2] One commentator endorses allowing agencies to set their own non-binding deadlines, subject to congressional oversight. Alden F. Abbott, *The Case*

Short of that, agencies should, at the absolute least, ensure that any settlement into which they enter reflects the public interest and maintains maximum legal flexibility, committing the agency to do absolutely nothing more than is required by law. In the case of the FWS "mega-settlement," the agency should not have abandoned its statutory authority to determine that an endangerment finding is warranted, but precluded by higher listing priorities—a status that allows public agencies, private landowners, and other interested parties to take actions to reduce threats and gather data so as to reduce the likelihood of a listing or, at the least, to undertake long-range planning with awareness of possible listings.[3]

**Your written testimony cites a finding that since 1993, 98 percent of EPA regulations under the major Clean Air Act programs (NAAQs, NESHAP, NSPS) missed their statutory deadlines, by an average of 5 ½ years.**

1. **How many non-discretionary deadlines are in the Clean Air Act?**
2. **Is there any publicly available resource that monitors EPA compliance with statutory deadlines? What about judicially imposed deadlines?**
3. **Since EPA is essentially out of compliance with all of its deadlines, does this mean that any court deadline affects how EPA must use its resources?**
4. **Given that the Congress expressly stipulated that environmental policymaking under the Clean Air Act be performed with the States through the principle of cooperative federalism, is it appropriate for the Agency to establish its priorities with environmental groups in settlement negotiations that exclude the input of state and local officials and representatives?**

Unfortunately, there is little public documentation of the problem of unrealistic mandatory deadlines. There is no central repository of information regarding EPA's compliance with mandatory deadlines, and it is probably impossible (do to the open-ended way that statutory obligations are often structured) to determine precisely how many deadlines EPA has violated at any given time. Given that the agency is subject to so many mandates, and is behind-deadline on so many of them, any settlement compelling the agency to

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*Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal*, 39 Admin. L. Rev. 171, 200–02 (1987).

[3] *See generally* 16 U.S.C. § 1533; Endangered and Threatened Wildlife and Plants; Review of Native Species That Are Candidates for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions, 76 Fed. Reg. 66369, 66370–71 (Oct. 26, 2011) (describing listing process).

take action on one of them necessarily delays agency action on other mandatory activities and priorities. If everything is a priority, then nothing is.

I agree with the conclusion that this state of affairs—where agency priorities are often determined through litigation—is inconsistent with Congress's intentions in enacting the cooperative federalism programs administered by EPA. It is appropriate that states have a seat at the table in determining national environmental priorities and that any discussion should not be limited to states that generally favor increased regulation and greater federal control.

**Can you explain why is it significant that sue-and-settle allows agencies to make decisions that are supposed to be reserved for Congress? How does it undermine basic democratic principles?**

Sue-and-settle is most valuable to agencies when the regulatory actions at issue are especially controversial. This includes the kinds of "major questions" that have traditionally been Congress's exclusive domain—for example, whether and how to regulate power plants' greenhouse gas emissions. Agencies eager to undertake such actions can expect to face substantial political resistance—the normal checks and balances intended by the Framers to moderate governmental action and ensure accountability among the branches and to the public. As described above and in my written testimony, collusive settlements help to circumvent these kinds of accountability mechanisms, and in so doing, they make it easier for agencies to take on major questions that in the past would have been left to Congress. Sue-and-settle is not the only cause of this phenomenon, and it is not sufficient on its own to allow agencies to take such actions, but it is a conspicuous and likely critical component of many recent drives by agencies to address major questions themselves.

Senator ROUNDS. Thank you, Mr. Grossman. We will now hear from our next witness, Mr. Alfredo Gomez from GAO. Mr. Gomez, you may begin.

**STATEMENT OF ALFREDO GOMEZ, DIRECTOR, NATURAL RESOURCES AND ENVIRONMENT, GOVERNMENT ACCOUNTABILITY OFFICE**

Mr. GOMEZ. Chairman Rounds, Ranking Member Markey and members of the Subcommittee, good morning. I am pleased to be here today to discuss our work on environmental litigation against the Environmental Protection Agency and the U.S. Fish and Wildlife Service.

As the primary agency charged with implementing many of the Nation's environmental laws such as the Clean Air Act and the Clean Water Act, EPA often faces litigation over its regulations and other actions. As many have already noted, citizens can sue EPA to compel the agency to take required actions such as issuing a rule on time and lawsuits often called deadline suits.

The Fish and Wildlife Service also faces litigation over its regulations and actions to carry out the Endangered Species Act. The Department of Justice provides legal defense to both EPA and the Fish and Wildlife Service in court.

So my statement today summarizes the results of reports on environmental litigation against EPA and the Fish and Wildlife Service. I will talk about three key points. First, information on the number of cases, second the legal costs that are available for EPA and the Fish and Wildlife Service, and third, the impact of deadline suits on EPA's rulemaking.

The first point is that the number of environmental cases brought against EPA each year varied and showed no discernable trend. On average there were about 155 cases per year. Justice staff defended EPA on a total of about 2,500 cases in the 16-year period ending in 2010. Most of these cases, or 59 percent, were filed under the Clean Air Act, 20 percent under the Clean Water Act, and the cases range from a high of 216 cases in 1997 to a low of 102 cases in 2008.

The plaintiffs filing these suits fell into several categories: 25 percent were trade associations, followed by private companies at 23 percent, local environmental groups and citizens groups made up 16 percent and national environmental groups made up 14 percent.

Second, with regard to the cost of litigation against EPA, the cost also varied from year to year with no discernable trend. Specifically, the Department of Justice spent about $47 million or on average $3.6 million annually to defend EPA in court. The Department of Treasury also paid about $14 million or about $2 million per year. As many of you know Treasury has to pay attorney fees and costs from the Department's judgment fund when plaintiffs win. EPA also paid approximately $1.6 million in attorney's fees and cost or about $305,000 per year.

The Fish and Wildlife Service, we reported on the limited information that the agency had available on lawsuits. The agency does not track cases and cost but pulled together some information

showing that it had paid $1.6 million for attorney fees and cost related to 26 cases from fiscal years 2004 through 2010.

Third, in our report on EPA deadline suits we found that EPA issued 32 major rules in a 5-year period that we reviewed. Nine of those 32 rules EPA issued were following settlement agreements and deadline suits. These nine rules were all Clean Air Act rules. The terms of the settlements in these deadline suits set up a new schedule to issue the rules.

An additional 5 of the 32 rules were issued to comply with court orders following deadline suits. The impact of settlements and court orders in deadline suits on EPA's rulemaking priorities was limited primary to one office within EPA. This is the Office of Air Quality Planning and Standards which is responsible for setting standards. Agency officials said that deadline suits affected the timing and order in which rules are issued. In other words, EPA has to priorities the rules that are under settlement agreements and court order first.

In summary, the environmental statutes allow litigation to check the authority of Federal agencies as they carry out or fail to carry out their duties. Available data do not show discernable trends in the number of cases, the cost associated with litigation against EPA, and there is limited information on the Fish and Wildlife Service. Information on deadline suits we reviewed show that the effect of settlement agreements from these suits was on the timing and the order on which the rules are being issued.

Mr. Chairman, Ranking Member Markey, that completes my statement.

[The prepared statement of Mr. Gomez follows:]

United States Government Accountability Office

GAO

Testimony

Before the Subcommittee on Superfund, Waste Management, and Regulatory Oversight, Committee on Environment and Public Works, U.S. Senate

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# ENVIRONMENTAL LITIGATION

## Information on Cases against EPA and FWS and on Deadline Suits on EPA Rulemaking

Statement of Alfredo Gómez, Director
Natural Resources and Environment

# GAO Highlights

Highlights of GAO-15-803T, a testimony before the Subcommittee on Superfund, Waste Management, and Regulatory Oversight, Committee on Environment and Public Works, U.S. Senate

## Why GAO Did This Study

Environmental statutes, such as the Clean Air Act and Clean Water Act, allow citizens to file suit against EPA to challenge certain agency actions, such as issuing regulations or rules. Such laws also require EPA to take certain actions, such as issuing rules, to implement provisions of the law within certain statutorily designated time frames. Citizens can sue EPA to compel the agency to take required actions, such as issuing a rule on time, in lawsuits often called deadline suits. EPA can negotiate a settlement to issue a rule by an agreed upon deadline.

Where EPA is named as a defendant, Justice provides EPA's legal defense. If successful, plaintiffs may be paid for certain attorney fees and costs. Payments are made from Treasury's Judgment Fund or EPA's appropriations.

Under the Endangered Species Act, FWS also faces lawsuits over its regulations and actions to carry out the act. As with EPA, Justice defends suits against FWS in court.

This testimony is based on GAO reports issued from August 2011 through December 2014 about litigation directed at EPA and FWS. It focuses on (1) information on cases and associated costs, as available, for EPA and FWS and (2) information on the impact of deadline cases on EPA rulemaking.

GAO did not make recommendations in the reports on which this testimony is based and is not making any in this testimony.

View GAO-15-803T. For more information, contact J. Alfredo Gómez at (202) 512-3841 or gomezj@gao.gov.

August 4, 2015

# ENVIRONMENTAL LITIGATION

## Information on Cases against EPA and FWS, and on Deadline Suits on EPA Rulemaking

## What GAO Found

As GAO reported in August 2011, the Environmental Protection Agency (EPA) faces legal challenges implementing the nation's key environmental laws. The number of environmental litigation cases brought against EPA each year for fiscal years 1995 through 2010 varied with no discernible trend. Data available from the Department of Justice, the Department of the Treasury, and EPA show that the costs associated with such cases against EPA have also varied from year to year with no discernible trend. Specifically,

- Justice staff defended EPA on an average of about 155 such cases each year from fiscal years 1995 through 2010, for a total of about 2,500 cases during that time. Most cases were filed under the Clean Air Act (59 percent of cases) and the Clean Water Act (20 percent of cases).
- According to stakeholders GAO interviewed, a number of factors—particularly a change in presidential administrations, new regulations or amendments to laws or EPA's not meeting statutorily required deadlines—affected environmental litigation.
- Justice spent at least $46.9 million, averaging $3.6 million annually, to defend EPA in court from fiscal years 1998 through 2010. In addition, owing to statutory requirements to pay certain successful plaintiffs for attorney fees and costs, the Treasury paid about $15.5 million from fiscal years 2003 through 2010—averaging about $2 million per fiscal year—to plaintiffs in environmental cases. EPA paid approximately $1.5 million from fiscal years 2006 through 2010—averaging about $305,000 per fiscal year—to plaintiffs for environmental litigation claims. (All amounts are in constant 2015 dollars.)

As one of the primary agencies responsible for implementing the Endangered Species Act, the U.S. Fish and Wildlife Service (FWS) faces litigation over its regulations and actions to carry out provisions of the act. In April 2012, GAO reported that FWS did not use a data system to track cases and associated fees and costs it paid. As a result, information regarding cases against FWS and associated costs was limited, with FWS data showing that the agency paid about $1.6 million in 26 cases from fiscal years 2004 through 2010.

As GAO reported in December 2014, of the 32 major rules that EPA stated it promulgated from May 31, 2008 to June 1, 2013, nine were issued following seven settlements in deadline lawsuits, all under the Clean Air Act. The terms of the settlements in these deadline suits established a schedule to issue a statutorily required rule(s) or to issue a rule(s) unless EPA determined that doing so was not appropriate or necessary pursuant to the relevant statutory provision. None of the seven settlements included terms that finalized the substantive outcome of a rule. The impact of settlements in deadline suits on EPA's rulemaking priorities was limited primarily to one office within EPA—the Office of Air Quality Planning and Standards (OAQPS)—because most deadline suits are based on provisions of the Clean Air Act for which that office is responsible. These provisions have recurring deadlines requiring EPA to set standards and to periodically review—and revise as necessary—those standards. OAQPS sets these standards through the rulemaking process. OAQPS officials said that deadline suits affect the timing and order in which rules are issued.

Chairman Rounds, Ranking Member Markey, and Members of the Subcommittee:

I am pleased to be here today as you consider the impact of litigation on the Environmental Protection Agency (EPA) and U.S. Fish and Wildlife Service (FWS). As the primary federal agency charged with implementing many of the nation's environmental laws, EPA often faces the prospect of litigation over its regulations and other actions. For example, several environmental statutes have provisions that allow citizens—including individuals, states, companies, and associations—to file suit against EPA challenging certain agency actions, such as making regulations or permitting decisions. In addition, some laws have provisions that allow citizens to file lawsuits to compel EPA to take statutorily required actions, such as issuing a rule, if it has not already done so with the statutorily required time frames. These are often called deadline suits.[1] Where EPA is named as the defendant in lawsuits, the Department of Justice (Justice), which is generally responsible for defending federal agencies in court, provides EPA's legal defense, and EPA provides technical expertise. Within Justice, the Environment and Natural Resources Division handles most of the defense work on EPA environmental litigation cases from its Washington, D.C., office, but some of the 94 U.S. Attorneys' Offices, particularly those in the New York City area, also handle a small number of cases and may work on some cases managed by the Environment and Natural Resources Division.

As one of the primary federal agencies responsible for implementing the Endangered Species Act, FWS also faces litigation over its regulations and actions to carry out provisions of the act. As with EPA, Justice defends suits against FWS in court.

My statement today focuses on (1) information on cases and associated costs as available for EPA and FWS, and (2) the impact of deadline suits on EPA's rulemaking.[2] This testimony is based on reports we issued from

[1]For the purposes of this testimony, we use the term deadline suit to mean a lawsuit in which an individual or entity sues because EPA has allegedly failed to perform any nondiscretionary act or duty by a deadline established in law. A nondiscretionary act or duty is an act or duty required by law.

[2]GAO has ongoing work examining deadline suits against FWS

August 2011 to December 2014.[3] Most of this work was about EPA. To conduct our work, we obtained and analyzed historical data from two components within Justice—the Environment and Natural Resources Division and the Executive Office for U.S. Attorneys. We gathered data from the Environment and Natural Resources Division's Case Management System database that tracks basic information on cases, including lead plaintiffs' names, filing and disposition dates, and relevant statutes. To examine the extent to which settlements in deadline suits have impacted EPA's rulemaking priorities, we obtained from EPA's Office of General Counsel data on deadline suits it had settled from January 2001 through July 2014 and the EPA office(s) responsible for implementing the terms of the settlements. We interviewed individuals from academia, an environmental group, industry, and a state official from Oklahoma, to obtain their perspectives on deadline suits.[4] We also collected information from FWS on cases where attorney fees were sought. More details on the scope and methodology for this work can be found in each of our issued reports. The work upon which this statement is based was conducted in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

## Background

To carry out its responsibilities under the nation's environmental laws, EPA conducts an array of activities, such as promulgating regulations; issuing and denying permits; approving state programs; and issuing enforcement orders, plans, and other documents. Many of these activities

[3]GAO, *Environmental Litigation: Cases against EPA and Associated Costs Over Time*, GAO-11-650 (Washington D.C.: Aug. 1, 2011); *Limited Data Available on USDA and Interior Attorney Fee Claims and Payments*, GAO-12-417R (Washington, D.C.: Apr. 12, 2012); and *Environmental Litigation: Impact of Deadline Suits on EPA's Rulemaking Is Limited*, GAO-15-34 (Washington, D.C.: Dec. 15, 2014).

[4] We chose these individuals because they had experience or knowledge related to deadline suits and could provide the perspective of different stakeholder groups. The views of these individuals cannot be generalized to those individuals or groups we did not interview.

may be subject to legal challenge.[5] Also, laws such as the Clean Air Act and Clean Water Act require EPA to take certain actions, such as issuing rules, to implement provisions of the law within certain statutorily designated time frames, and EPA is subject to legal challenge for not taking the mandatory actions by the required deadline. If the legal challenge is a deadline suit, EPA works with Justice to consider several factors in determining whether or not to settle the deadline suit and the terms of any settlement.

## Environmental Statutes and Lawsuits against EPA

Statutes establishing programs administered by EPA, and under which the agency may be sued, include 10 of the nation's most prominent environmental laws, such as the Clean Air Act; Clean Water Act; Comprehensive Environmental Response, Compensation, and Liability Act (better known as the Superfund law); Emergency Planning and Community Right-to-Know Act; Federal Insecticide, Fungicide, and Rodenticide Act and related provisions of the Federal Food, Drug, and Cosmetic Act; Resource Conservation and Recovery Act; Safe Drinking Water Act; and Toxic Substances Control Act.[6]

Generally, the federal government has immunity from lawsuits, but federal laws authorize three types of suits related to EPA's implementation of environmental laws.[7] First, most of the major environmental statutes include "citizen suit" provisions authorizing citizens—including individuals, associations, businesses, and state and local governments—to sue EPA

[5]Actions that may be challenged in court generally fall into several categories: rulemakings, permit decisions and other approvals, enforcement actions, and other actions. In a rulemaking, EPA publishes a proposed regulation for public review and comment and then issues a final regulation. Generally, challenges may be brought after EPA has issued its final rule. In a permit decision, EPA processes an application according to relevant procedures, which typically provide for a draft permit and opportunity for the applicant and interested public to comment before the agency's issuance or denial of a final permit. Generally, only final permit decisions, including the process by which a decision was made, may be challenged.

[6]Some of these laws specifically authorize suits against EPA, while the Administrative Procedure Act, which is the federal law generally governing how federal agencies may propose and establish regulations, authorizes judicial review of certain federal agency actions. See, GAO-11-650.

[7]These environmental laws typically also authorize suits against other federal agencies for violations. For example, a citizen could file a lawsuit against a federal agency for operating a hazardous waste facility without a Resource Conservation and Recovery Act permit.

when the agency fails to perform an action mandated by law. These suits include deadline suits. Second, the major environmental statutes typically include judicial review provisions authorizing citizens to challenge certain EPA actions, such as promulgating regulations or issuing permits. Third, the Administrative Procedure Act[8] authorizes challenges to certain agency actions that are considered final actions, such as rulemakings and decisions on permit applications. As a result, even if a particular environmental statute does not authorize a challenge against EPA for a final decision or regulation, the Administrative Procedure Act may do so.

A lawsuit challenging EPA's failure to act may begin when the aggrieved party sends EPA a notice of intent to sue, if required, and a lawsuit challenging a final EPA action begins when a complaint is filed in court.[9] Before EPA takes final action, the public or affected parties generally have opportunities to provide comments and information to the agency. In addition, administrative appeals procedures are available—and in many cases required[10]—to challenge EPA's final action without filing a lawsuit in a court.[11] For example, citizens can appeal an EPA air emission permit to the agency's Environmental Appeals Board. These administrative processes provide aggrieved parties with a forum that may be faster and less costly than a court.

If a party decides to pursue a case, the litigation process generally involves the filing of a complaint; formal initiation of the litigation; motions to the court before trial, such as asking for dismissal of the case; and hearings and court decisions. If successful, plaintiffs may be paid for certain attorney fees and costs. Payments are made from Treasury's Judgment Fund or EPA's appropriations. Throughout this process, the parties to the litigation can decide to reach a settlement. Negotiations

[8]Administrative Procedure Act, 60 Stat. 237 (1946), codified as amended at 5 U.S.C. § 551 (2011).

[9]Generally, the environmental statutes' citizen suit provisions require a prospective plaintiff to first send EPA a formal notice of intent to sue. Conversely, neither these statutes' judicial review provisions nor the Administrative Procedure Act impose a notice requirement.

[10]In general, a party must first exhaust all available administrative appeals before initiating a judicial suit.

[11]For example, EPA's Environmental Appeals Board can decide disputes such as appeals from permit decisions, civil penalty decisions, and other administrative decisions.

between the aggrieved party and EPA may occur anytime after the agency action, at any point during active litigation, and even after judgment.

## The Endangered Species Act and Lawsuits against FWS

FWS's mission is to work with others to conserve, protect, and enhance fish, wildlife, and plants and their habitats for the continuing benefit of the American people. FWS is responsible for administering the Endangered Species Act for freshwater and land species. Under the act, FWS works to implement its requirements, such as consulting with federal agencies to determine if actions may affect listed species or habitats identified as critical to the species' survival, and acting on applications for permits required when non-federal activities will result in take of threatened or endangered species. The act authorizes parties to file challenges to government actions affecting threatened and endangered species. These lawsuits can include deadline suits as well as other types of lawsuits.

## EPA and Justice Consider Several Factors in Deciding Whether to Settle Deadline Suits

EPA has primary regulatory authority that allows citizens to file a deadline suit for laws including the following: the Superfund law; Clean Air Act, Clean Water Act, Emergency Planning and Community Right-to-Know Act, Safe Drinking Water Act, Resource Conservation and Recovery Act, and Toxic Substances Control Act. According to EPA and Justice officials, when a deadline suit is filed, the agencies work together to determine how to respond to the lawsuit, including whether or not to negotiate a settlement with the plaintiff to issue a rule by an agreed upon deadline or allow the lawsuit to proceed. In making this decision, EPA and Justice consider several factors to determine which course of action is in the best interest of the government. According to EPA and Justice officials, these factors include (1) the cost of litigation, (2) the likelihood that EPA will win the case if it goes to trial, and (3) whether EPA and Justice believe they can negotiate a settlement that will provide EPA with sufficient time to complete a final rule if required to do so.

EPA and Justice officials have often chosen to settle deadline suits when EPA has failed to fulfill a mandatory duty because it is very unlikely that the government will win the lawsuit. In many such cases, the only dispute is over the appropriate remedy (i.e., fixing a new date by which EPA should act). Additionally, in such cases, officials may believe that negotiating a settlement is the course of action most likely to create sufficient time for EPA to complete the rulemaking if it is required to issue

a rule. EPA and Justice have an agreement under which both must concur in the settlement of any case in which Justice represents EPA.[12]

In negotiating the terms of settlements, EPA and Justice are guided by, among other things, a 1986 Justice memorandum—referred to as the Meese memorandum—the underlying concepts of which were codified in the Code of Federal Regulations in 1991.[13] The regulation provides that any proposed settlement must be approved by the Deputy Attorney General or Associate Attorney General, as appropriate, when the proposed settlement converts an otherwise discretionary authority of the agency to promulgate, revise, or rescind regulations into a mandatory duty.[14] Thus, in general, this policy restricts Justice from entering into a settlement if it commits EPA to take an otherwise discretionary action, such as including specific substantive content in the final rule, unless an exception to this restriction is granted by the Deputy Attorney General or Associate Attorney General of the United States. According to EPA and Justice officials, as of December 2014, to their knowledge, EPA has been granted only one exception to the general restriction on creating mandatory duties through settlements—a 2008 settlement in a suit

[12]Memorandum of Understanding between the Department of Justice and the Environmental Protection Agency (June 15, 1977).

[13]See 28 C.F.R. §§ 0.160-0.163.

[14]The Meese memorandum and the regulation treat the distinction between consent decrees and settlement agreements differently. The Meese memorandum draws a distinction between the executive branch's authority to enter into consent decrees, which are negotiated agreements that are formally entered as court orders and thus enforceable by the court, and settlement agreements, which are similar in form to consent decrees but not entered as court orders. According to the memorandum, Justice should not enter into a consent decree that converts into a mandatory duty the otherwise discretionary authority of that agency to promulgate, revise, or rescind regulations. Regarding settlement agreements, the memorandum states that Justice should not enter into a settlement agreement that interferes with the agency's authority to revise, amend, or promulgate regulations through the procedures set forth in the Administrative Procedure Act. The related regulation does not make a distinction between consent decrees and settlement agreements. It requires that all proposed settlements that convert into a mandatory duty the otherwise discretionary authority of that agency to promulgate, revise, or rescind regulations be referred to the Deputy Attorney General or the Associate Attorney General of the United States. Finally, a 1999 Justice memorandum—referred to as the Moss memo—concludes that the distinction that the Meese memorandum draws between consent decrees and settlement agreements is not of legal significance for purposes of determining the legal limits on discretion-limiting settlements except, possibly, in rare cases.

related to water quality criteria for pathogens and pathogen indicators.[15] The Meese memorandum also provides that Justice should not enter into a settlement agreement that interferes with the agency's authority to revise, amend, or promulgate regulations through the procedures set forth in the Administrative Procedure Act.[16] As such, EPA officials stated that they have not, and would not agree to settlements in a deadline suit that finalizes the substantive outcome of the rulemaking or declare the substance of the final rule.

## The Number of Environmental Litigation Cases against EPA and Their Associated Costs Varied with No Discernible Trend, and Information on FWS Lawsuits Is Limited

As discussed in our August 2011 report,[17] the number of environmental litigation cases brought against EPA each year from fiscal year 1995 through fiscal year 2010 varied with no discernible trend. Similarly, data available from Justice, the Department of the Treasury, and EPA show that the costs associated with environmental litigation cases against EPA have varied from year to year for fiscal years 1998 through 2010, averaging at least $3.6 million per year with no discernible trend. Information regarding lawsuits against FWS is limited, with FWS data showing that the agency paid about $1.6 million in 26 cases from fiscal years 2004 through 2010.

[15]See Natural Resources Defense Council et al. vs. Johnson et al., No. CV06-04843 PSG (JTL) (C.D.Cal. 2008). In this settlement, EPA agreed to complete two epidemiological studies not expressly required by section 104(v) of the Clean Water Act after a court ruled that EPA had not satisfied the requirements of that section.

[16]See 5 U.S.C. § 553.

[17]GAO-11-650.

## The Number of Environmental Litigation Cases against EPA Showed No Discernible Trend over 16 Years, and Stakeholders Stated that Various Factors Affected Yearly Numbers

In August 2011, we reported that there were no aggregated data on environmental litigation or associated costs reported by federal agencies.[18] The key agencies involved—Justice, EPA and Treasury—maintained certain data on individual cases in decentralized databases. In particular, each of Justice's litigation components maintained a separate case management system to gather information related to individual cases. We were able to merge cases from two systems for purposes of our work.[19]

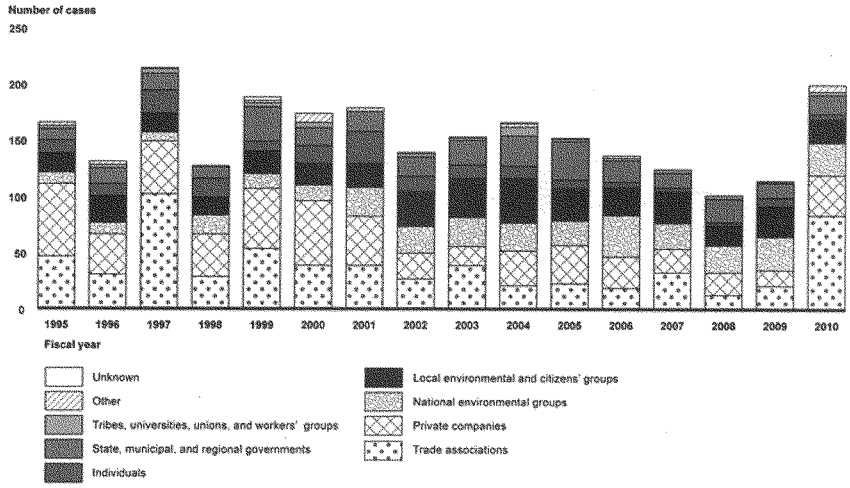
The average number of new cases filed against EPA each year was 155, ranging from a low of 102 new cases filed in fiscal year 2008 to a high of 216 cases filed in fiscal year 1997 (see fig. 1). In all, Justice defended EPA in nearly 2,500 cases from fiscal year 1995 through fiscal year 2010. The greatest number of cases was filed in fiscal year 1997, which, according to a Justice official, may be explained by the fact that EPA revised its national ambient air quality standards for ozone and particulate matter in 1997, which may have caused some groups to sue. In addition, according to the same official, in 1997 EPA implemented a "credible evidence" rule, which also was the subject of additional lawsuits.[20] The fewest cases against EPA (102) were filed in fiscal year 2008, and Justice officials were unable to pinpoint any specific reasons for the decline. In fiscal years 2009 and 2010, the caseload increased. A Justice official said that it is difficult to know why the number of cases might increase because litigants sue for different reasons, and some time might elapse between an EPA action and a group's decision to sue.

[18]GAO-11-650.

[19]GAO-11-650.

[20]EPA's "credible evidence" rule, 62 Fed. Reg. 8314 (Feb. 24, 1997), allows any credible evidence to be used in enforcement actions related to operating permits under Clean Air Act emissions standards. Trade associations representing various industry groups, including car manufacturers, lumber companies, steel producers, petroleum companies, and mining companies challenged the rule in federal court. Twenty-five petitions were filed in the D.C. Court of Appeals, which consolidated them. See Clean Air Implementation Project v. Environmental Protection Agency, 150 F.3d 1200 (D.C. Cir. 1998).

Figure 1: Environmental Cases Filed against EPA, Fiscal Year 1995 through Fiscal Year 2010

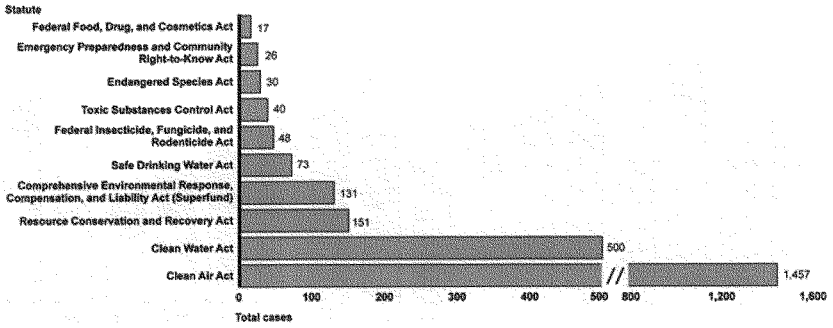



Source: GAO analysis of Justice data. | GAO-15-803T

As shown in figure 2, most cases against EPA were brought under the Clean Air Act, which represented about 59 percent of the approximately 2,500 cases that were filed during the 16-year period of our August 2011 report (i.e., fiscal year 1995 through fiscal year 2010).[21] Cases filed under the Clean Water Act represented the next largest group of cases (20 percent), and the Resource Conservation and Recovery Act represented the third largest group of cases (6 percent).

[21]GAO-11-650.

Figure 2: Environmental Cases Filed against EPA by Statute, Fiscal Year 1995 through Fiscal Year 2010




Source: GAO analysis of data from Justice's Environment and Natural Resources Division. | GAO-15-803T

The lead plaintiffs filing cases against EPA during the 16-year period of our August 2011 report fit into several categories. The largest category comprised trade associations (25 percent), followed by private companies (23 percent), local environmental groups and citizens' groups (16 percent), and national environmental groups (14 percent). Individuals, states and territories, municipal and regional government entities, unions and workers' groups, tribes, universities, and a small number of others we could not identify made up the remaining plaintiffs (see table 1).[22]

[22]See GAO-11-650 for more information about our methodology of developing these categories and classifying cases.

**Table 1: Share of Cases by Lead Plaintiff Type, Fiscal Year 1995 through Fiscal Year 2010**

| Plaintiff types | Number of cases | Percentage |
|---|---|---|
| Trade associations | 622 | 25 |
| Private companies | 566 | 23 |
| Local environmental and citizens' groups | 388 | 16 |
| National environmental groups | 338 | 14 |
| States, territories, municipalities, and regional government entities | 297 | 12 |
| Individuals | 185 | 7 |
| Unions, workers' groups, universities, and tribes | 46 | 2 |
| Other | 33 | 1 |
| Unknown | 7 | 1a |
| **Total** | **2,482** | **100** |

Source: GAO. | GAO-15-803T

[a]Less than 1 percent.

According to the stakeholders we interviewed for our August 2011 report,[23] a number of factors—particularly a change in presidential administration, the passage of regulations or amendments to laws, and EPA's failure to meet statutory deadlines—affect plaintiffs' decisions to bring litigation against EPA. Stakeholders did not identify any single factor driving litigation, but instead, attributed litigation to a combination of different factors. According to most of the stakeholders we interviewed, a new presidential administration is an important factor in groups' decisions to bring suits against EPA. Some stakeholders suggested that a new administration viewed as favoring less enforcement could spur lawsuits from environmental groups in response, or industry groups could sue to delay or prevent the outgoing administration's actions. Other stakeholders suggested that if an administration is viewed as favoring greater enforcement of rules, industry may respond to increased activity by bringing suit against EPA to delay or prevent the administration's actions, and certain environmental groups may bring suit with the aim of ensuring that required agency actions are completed during an administration they perceive as having views similar to the groups' own. Most of the stakeholders interviewed also said that the development of new EPA

[23]GAO-11-650.

regulations or the passage of amendments to environmental statutes may lead parties to file suit against the new regulations or against EPA's implementation of those amendments. One stakeholder noted that an industry interested in a particular issue may become involved in litigation related to the development of regulations because it wishes to be part of the regulatory process and negotiations that result in a mutually acceptable rule.

## Available Data Indicated that Costs Associated with Environmental Litigation against EPA, including Payments to Plaintiffs, Have Varied over the Past 10 Years with No Discernible Trend

Data available for our August 2011 report from Justice, Treasury, and EPA show that the costs associated with environmental litigation cases against EPA have varied from year to year with no discernible trend.[24] Justice's Environment and Natural Resources Division spent a total of about $46.9 million to defend EPA in these cases from fiscal year 1998 through fiscal year 2010, averaging at least $3.6 million per year.[25] Some cost data from Justice were not available, however, in part because Justice's Environment and Natural Resources Division and the U.S. Attorneys' Offices did not have a standard approach for maintaining key data for environmental litigation cases.[26] For example, while the Environment and Natural Resources Division tracked attorney hours by case, the U.S. Attorneys' Offices did not. In addition, owing to statutory requirements to pay certain successful plaintiffs for attorney fees and costs, Treasury paid a total of about $15.5 million to prevailing plaintiffs for attorney fees and costs related to these cases for fiscal years 2003 through 2010, averaging about $2 million per year. EPA paid a total of $1.5 million from fiscal year 2006 through fiscal year 2010 in attorney fees and costs, averaging about $305,000 per year.

[24]GAO-11-650.

[25]All figures are in constant 2015 dollars.

[26] Justice officials said, however, that they do not plan to change their approach to managing the data because they use the data in each system to manage individual cases, not to identify and summarize agencywide data on cases or trends. Because the two Justice components are not regularly required to merge and report their data in a systematic way, we did not make a recommendation regarding these data or systems.

## Information Regarding Lawsuits against FWS Is Limited

In April 2012, we reported that the FWS did not use a data system for cases brought against FWS to track attorney fees and costs paid by the Endangered Species Program but that the agency tracked this information in its Washington office using a spreadsheet.[27] FWS officials gathered information on those cases paid by the Washington office and supplemented the information with four endangered species cases identified by the agency's regional offices. However, not all regional offices tracked attorney fee payments, so the data may not be complete for fiscal years 2004 through 2010. That is, FWS officials were not sure that they had provided the complete universe of cases. FWS data show that FWS paid about $1.6 million in the 26 cases from fiscal years 2004 through 2010.

[27]GAO-12-417R.

## Settlements in EPA Deadline Suits Established a Schedule for Issuing Rules, and according to EPA Officials, These Settlements Primarily Impacted a Single EPA Office

In December 2014,[28] we reported that the terms of settlements in deadline suits that resulted in EPA issuing major rules[29] from May 31, 2008, through June 1, 2013, established a schedule for issuing rules.[30] Specifically, the settlements were to either promulgate a statutorily required rule or make a determination that doing so is not appropriate or necessary pursuant to the relevant statutory provision. EPA received public comments on all but one of the draft settlements in these suits. According to EPA officials we interviewed for our December 2014 report,[31] settlements in deadline suits primarily affected a single office within EPA because most deadline suits are based on provisions of the Clean Air Act for which that office is responsible.

[28]GAO-15-34.

[29]Under the Congressional Review Act, all rules, including those issued by EPA, are classified as either a major rule or a nonmajor rule. The Congressional Review Act defines a "major" rule as one that has resulted in or is likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets. 5 U.S.C. § 804(2).

[30]This testimony examines deadline suits that seek to compel EPA to either (1) issue a statutorily required rule when that rule has a deadline in law or (2) issue a statutorily required rule or make a determination that issuing such a rule is not appropriate or necessary pursuant to the relevant statutory provision, when issuing that rule or making that determination has a deadline in law. However, there are other types of nondiscretionary duties for which EPA can be sued. For example, in general, if a provision in law requires an agency to take an action, such as respond to a petition, but does not specify a date or set amount of time after the occurrence of an event by which the action must be taken, then a lawsuit to compel such an action is often referred to as an unreasonable delay suit. In addition to deadline and unreasonable delay suits, EPA can also be sued on other grounds. For example, a final rule issued by EPA may be challenged in court. As a result, a court may order EPA, or EPA may agree in a settlement, to issue a new rule. We did not include suits other than deadline suits in this testimony.

[31] GAO-15-34.

## Settlements in Deadline Suits Established a Schedule for Issuing Rules, and EPA Received Public Comments on Drafts of Most Settlements in Deadline Suits

In our December 2014 report,[32] we found that EPA issued 32 major rules from May 31, 2008, through June 1, 2013. According to EPA officials, the agency issued 9 of these rules following settlements in seven deadline suits. They were all Clean Air Act rules. Two of the settlements established a schedule to complete 1 or more rules, and five settlements established a schedule to complete 1 or more rules or make a determination that such a rule was not appropriate or necessary in accordance with the relevant statute. Some of the schedules included interim deadlines for conducting rulemaking tasks, such as publishing a notice of proposed rulemaking in the Federal Register.[33]

In addition to schedules, the seven settlements also included, among other things, provisions that allowed deadlines to be modified (including the deadline to issue the final rule) and specified that nothing in the settlement can be construed to limit or modify any discretion accorded EPA by the Clean Air Act or by general principles of administrative law. Consistent with Justice's 1986 Meese memorandum, none of the settlements we reviewed included terms that required EPA to take an otherwise discretionary action or prescribed a specific substantive outcome of the final rule.

The Clean Air Act requires EPA, at least 30 days before a settlement under the act is final or filed with the court, to publish a notice in the Federal Register intended to afford persons not named as parties or interveners to the matter or action a reasonable opportunity to comment in writing.[34] EPA or Justice, as appropriate, must then review the comments and may withdraw or withhold consent to the proposed settlement if the comments disclose facts or considerations that indicate consent to the settlement is inappropriate, improper, inadequate, or inconsistent with Clean Air Act requirements.[35] The other major environmental laws with provisions that allow citizens to file deadline suits do not have a notice and comment requirement for proposed

[32]GAO-15-34.

[33]Even where interim rulemaking steps are not expressly set forth in a settlement, EPA officials stated that they go through the necessary rulemaking procedures such as notice and comment.

[34]See 42 U.S.C. § 7413(g).

[35]See id.

settlements.[36] According to an EPA official, with the exception of the agency's pesticide program, EPA generally does not ask for public comments on defensive settlements (i.e., settlements on cases in which EPA is being sued) if the agency is not required to do so by statute.[37]

Of the 32 major rules that EPA issued from May 31, 2008 to June 1, 2013, 9 rules following seven settlements in deadline suits were Clean Air Act rules. For each settlement, EPA published a notice in the Federal Register providing the public the opportunity to comment on a draft of the settlement. EPA received from 1 to 19 public comments on six of the draft settlements. No comments were received on one of the draft settlements. Based on EPA summaries of the comments, the comments concerned the reasonableness of the deadlines contained in the settlements or supported or objected to the settlements. For example, some comments supported the deadline or asserted that the deadlines should be accelerated, and other comments stated that EPA would have difficulty meeting the deadlines. EPA determined that none of the comments on any of the draft settlements disclosed facts or considerations that indicated that consent to the settlement in question would be inappropriate, improper, inadequate, or inconsistent with the act.

## According to EPA Officials, Settlements in Deadline Suits Primarily Affected Rulemaking Priorities in a Single EPA Office

According to EPA officials interviewed for our December 2014 report, settlements in deadline suits primarily affected a single office within EPA—the Office of Air Quality Planning and Standards (OAQPS)—because most deadline suits were based on provisions of the Clean Air Act for which that office is responsible.[38] According to EPA's Office of General Counsel, provisions in the Clean Air Act that authorize the

[36]The Administrative Procedure Act and EPA regulations require notice and comment of proposed agency rulemaking, whether or not it may have been the subject of a settlement. 5 U.S.C. § 553(b), (c); 40 C.F.R. § 25.10. This includes the right of interested persons to be given an opportunity to participate in the rulemaking by the submission of written data, views, and arguments. According to Justice officials, settlements are structured to preserve public participation in any ensuing rulemaking proceeding and to not predetermine the outcome of that proceeding.

[37]According to the EPA official, the pesticides program has a regular practice of posting on its website proposed settlements associated with the program's issues. The program posts these documents because the program has a well-defined and knowledgeable community of stakeholders that is likely to be affected by the settlements.

[38]OAQPS is an office within EPA's Office of Air and Radiation.

National Ambient Air Quality Standards program and Air Toxics program account for most deadline suits. These provisions have recurring deadlines requiring EPA to set standards and to periodically review—and revise as appropriate or necessary—those standards. OAQPS sets these standards through the rulemaking process. For example, the Clean Air Act requires EPA to review and revise as appropriate National Ambient Air Quality Standards every 5 years and to review and revise as necessary technology standards for numerous air toxics generally every 8 years.

The effect of settlements in deadline suits on EPA's rulemaking priorities is limited to timing and order. OAQPS officials said that deadline suits affect the timing and order in which rules are issued by the National Ambient Air Quality Standards program and the Air Toxics program, but not which rules are issued. The officials also noted that the effect of deadline suits on the two programs differs because of the different characteristics of the programs.

In conclusion, environmental statutes allow litigation to check the authority of federal agencies as they carry out—or fail to carry out—their duties. Available data did not show discernible trends in the number of cases or costs associated with the litigation against EPA and there was limited information on FWS. Information on deadline suits showed that the effect of settlements in deadline suits was primarily on one office and limited to the timing and order in which rules were issued.

Chairman Rounds, Ranking Member Markey, and Members of the Subcommittee, this concludes my prepared statement. I would be pleased to answer any questions you may have at this time.

## GAO Contact and Staff Acknowledgments

If you or your staff members have any questions about this testimony, please contact me at (202) 512-3841 or gomezj@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this testimony. Susan Iott (Assistant Director), Charlie Egan, Cindy Gilbert, Rich Johnson, Tracey King, Marya Link, Maria Strudwick, and Kiki Theodoropoulos made key contributions to this testimony.

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**August 4, 2015 Senate Environment and Public Works Hearing:**
**"Oversight of Litigation at EPA and FWS: Impacts on the U.S. Economy, states, Local Communities and the Environment."**
**CHAIRMAN INHOFE--Questions for the Record**
**Jose Alfredo Gomez, Director, Natural Resources and Environment**

1. **Sue-and-settle tends to bind EPA to propose rushed rules, short circuiting important economic analysis. In July 2014 your office issued a report that found, in part, EPA did not always conduct proper cost-benefit analysis of rules due to short court-ordered deadlines.**

   a. **How often does EPA agree to deadlines that do not afford the agency ample time to conduct robust economic analysis?**

      GAO Response:

      We have not conducted the work necessary to answer this question. In our July 2014 report *Environmental Regulation: EPA Should Improve Adherence to Guidance for Selected Elements of Regulatory Impact Analyses*, GAO-14-519, (Washington, D.C.: July 18, 2014), we analyzed a nonprobability sample of seven economically significant rules EPA finalized from 2009 through 2011. Based on this work, we cannot extrapolate to a conclusion about the effect that deadlines have, in general, on EPA's ability to conduct economic analysis.

   b. **How do short timeframes, whether court-imposed or not, affect an agency's ability to conduct thorough economic analyses for rulemakings?**

      GAO Response:

      In our July 2014 report, we analyzed seven rules and found that EPA did not monetize certain benefits and costs related to the primary purposes or key impacts of three of these rules, in part, because of time limitations. Specifically, we found that for two of the seven rules—both aimed at reducing emissions of specific air pollutants—EPA quantified the amount of reductions expected for certain pollutant emissions, but did not monetize the health benefit associated with those emissions reductions. As we stated in the report, EPA explained that methodological and time constraints under court-ordered schedules for these two regulations precluded them from monetizing these effects.

Additionally, in our July 2014 report, we found that for a third rule out of the seven rules we analyzed—this one aimed at increasing the use of renewable fuels such as ethanol—EPA quantified some adverse water quality effects of the renewable fuel standard but did not monetize these effects. As we state in the report, EPA officials said they used models to quantify the amounts of nitrogen pollution in water expected from the rule but were not able to use the model to place an economic value on this pollution, stating that limited time and resource constraints precluded them from developing such an economic value.

Finally, in our July 2014 report, we conclude, among other things, that a key aspect of regulatory analysis is monetizing the benefits and costs, but that the Office of Management and Budget guidance that EPA follows in conducting such analyses acknowledges this is not always possible. However, we note in our July 2014 report that when EPA does not monetize key benefits and costs, the regulatory analyses may be limited in their usefulness for helping decision makers and the public understand economic trade-offs among different regulatory alternatives.

2. **In your December 2014 report on EPA deadline suits, you concluded that such suits had limited impact on the timing of regulations; however, it recognized that deadline suits affect the timing rules were issued, that is, the Agency's priorities. Accordingly, isn't it true deadline suits do impact the timing of the Agency action?**

GAO Response:

As we state in our December 2014 report *Environmental Litigation: Impact of Deadline Suits on EPA's Rulemaking Is Limited*, GAO-15-34 (Washington, D.C.: Dec. 15, 2014), EPA officials said that deadline suits affect the timing and order in which rules are issued but not which rules are issued. The officials further stated that settlements in deadline suits primarily affect a single office within EPA—the Office of Air Quality Planning and Standards (OAQPS)—because most deadline suits are based on provisions of the Clean Air Act for which that office is responsible. According to EPA's Office of General Counsel, provisions in the Clean Air Act that authorize the National Ambient Air Quality

Standards (NAAQS) program and Air Toxics program account for most deadline suits. These provisions have recurring deadlines requiring EPA to set standards and to periodically review—and revise as necessary—those standards.

Additionally, as we state in our December 2014 report, EPA officials told us that deadline suits addressing the NAAQS standards did not affect which NAAQS standards were reviewed since EPA reviewed all of the standards. According to EPA officials, the deadline suits did affect the timing and order in which EPA conducted the reviews to accommodate the time frames in the settlements and court orders. With regard to the Air Toxics program, EPA officials reported that, as of October 2014, most of the resources available to review—and revise as necessary—the overdue air toxic standards are focused on a 2011 settlement. This settlement listed 27 overdue air toxic standards (out of a total of 57 overdue air toxic standards, as of October 2014). Officials said that they intend to complete all of the overdue standards but are focused on fulfilling the terms of the 2011 settlement and several other settlements to which EPA has entered into that address a smaller number of reviews.

3. **Your December 2014 report implies that only 9 of 32 major rules were implicated by deadline suits; however, 15 of the rules were either discretionary or non-justiciable meaning they could not have been subject to a deadline suit to begin with. Why did your review include rules that would not have been subject to a deadline suit?**

GAO Response:

Our December 2014 report (GAO-15-34) examines the terms of settlements in deadline suits that led EPA to promulgate major rules[1] in the last 5 years. The methodology we used to identify these rules called for us to first develop a list of all major rules EPA issued from May 31, 2008 through June 1, 2013. EPA issued 32 major rules during this

[1] Under the Congressional Review Act (CRA), all rules, including those issued by EPA, are classified as either a major rule or a nonmajor rule. The CRA defines a "major" rule as one that has resulted in or is likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets. 5 U.S.C. § 804(2).

timeframe. EPA officials then identified 9 major rules, out of the 32 major rules, that EPA issued following a settlement in a deadline suit. A more detailed description of our methodology can be found in our report.

4. **Your December 2014 report relied exclusively on statements and materials provided by EPA and Department of Justice (DOJ) personnel because neither EPA nor DOJ maintain a database that links settlements to rules. For years, Congress and the public have asked EPA to be more transparent with information about sue-and-settle negotiations.**

   a. **Do you acknowledge this lack of transparency at EPA?**

      GAO Response:

      As you note, in our December 2014 report (GAO-15-34), we relied on EPA for key information about which major rules EPA issued following a settlement in a deadline suit because neither EPA nor DOJ maintains a database that links settlements to rules, and there is no comprehensive public source of such information. DOJ represents EPA in litigation. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

   b. **If EPA released more information on its settlement agreements, would GAO be able to conduct more comprehensive analysis on the topic?**

      GAO Response:

      As we stated in our December 2014 report, we believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. We are unable to speculate on what our findings or conclusions might have been based on hypothetically differing evidence.

   c. **Could additional information yield a different outcome from GAO analysis?**

      GAO Response:

As we stated in our December 2014 report, we believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. We are unable to speculate on what our findings or conclusions might have been based on hypothetically differing evidence.

5. **According to the Federal Register notices of proposed Clean Air Act settlement agreements lodged with the courts, at least 60 such agreements were reached within the first Obama administration alone. However, the December 2014 GAO report only considered 7 settlement agreements.**

   a. **What was the methodology for determining which settlement agreements would be considered?**

   GAO Response:

   We provide a brief summary of our methodology in our response to question 3 and a~~.~~ ~~A~~ more detailed description of our methodology can be found in our December 2014 report (GAO-15-34).

   b. **Why did GAO not consider all the settlement agreements?**

   GAO Response:

   In designing our December 2014 report, we agreed to a methodology that resulted in us considering seven settlement agreements. A detailed description of our methodology can be found in our December 2014 report.

6. **The December 2014 GAO report seemingly contradicts itself since it is entitled, "Environmental Litigation: Impact of Deadline Suits on EPA's Rulemaking is Limited," yet the report shows that impacts are not limited. For example, the report notes with respect to the recurring review of hazardous air pollution standards for specific industries under the NESHAP program, "most of the resources available to complete [the recurring reviews] are focused on a 2011. ...officials said they intend to complete all of the overdue [reviews] but are focused on fulfilling the terms of the 2011 settlement and several other settlements..."**

   a. **Do you agree that when settlements force EPA to redirect their resources that it impacts rules?**

GAO Response:

Yes, we agree that to comply with settlements to which EPA has entered into, it must sometimes redirect resources and this can impacts the timing and order in which rules are issued. As we state in our December 2014 report (GAO-15-34), the effect of settlements is to impact the timing and order in which rules are issued by the NAAQS program and the Air Toxics program, but not which rules are issued.

Regarding the Air Toxics program, as you note in your question, EPA officials told us that, as of October 2014, most of the resources available to complete [the recurring reviews] are focused on a 2011 settlement. This settlement listed 27 of the 57 reviews that were overdue.

**b. Why does GAO find this impact to be "limited"?**

GAO Response:

In our December 2014 report, we found that settlements in deadline suits are primarily ~~affect~~ limited to a single office within EPA and that according to EPA officials, deadline suits affect the timing and order in which rules are issued but not which rules are issued.

**7. Your written testimony stated that "information regarding lawsuits against FWS is limited."**

**a. Does GAO recommend that FWS provide more information regarding information about lawsuits against them?**

GAO Response:

As you note, we stated in our written testimony that information regarding lawsuits against FWS is limited.[2] This statement is based on a report we issued in April 2012 *Limited Data Available on USDA and Interior Attorney Fee Claims*

[2] *Environmental Litigation: Information on Cases against EPA and FWS and on Deadline Suits on EPA Rulemaking*, GAO-15-803T (Washington, D.C.: Aug. 4, 2015).

*and Payments*, GAO-12-417R (Washington, D.C.: Apr. 12, 2012). In this report, we address the availability of certain information regarding lawsuits for 75 USDA and Interior agencies, including FWS. Regarding FWS, we reported that the agency could provide information on attorney fees and other costs from FY 2004 through 2010 for some lawsuits—mostly those associated with its Washington Office, but that officials were not sure that they had provided us with the complete universe of cases because not all regions tracked attorney fees. We did not make any recommendations in this report.

**b. EPA only started posting notices of intent to sue (NOIs) on its website in 2013, does FWS post NOIs?**

GAO Response:

As we state in our December 2014 report (GAO-15-34), laws such as the Clean Air Act generally require a person to file a Notice of Intent to Sue (NOI) with EPA before filing a deadline suit. Although not statutorily required to publically post NOIs, in January 2013, EPA began to post NOIs at http://www.epa.gov/ogc/noi.html.

Regarding the FWS, GAO has ongoing work examining deadline suits against FWS and ~~are~~ is unable to comment on this work.

**c. Would additional information lead to a more informed conclusion from GAO?**

GAO Response:

As noted in our response to question 7b, GAO has ongoing work examining deadline suits against FWS. We are unable to speculate on the findings or conclusions this work might yield.

Senator ROUNDS. Thank you Mr. Gomez. Our next witness is Mr. Justin Pidot. Mr. Pidot, you may begin.

**STATEMENT OF JUSTIN PIDOT, ASSOCIATE PROFESSOR, UNIVERSITY OF DENVER STURM COLLEGE OF LAW**

Mr. PIDOT. Good morning, Mr. Chairman, Ranking Member Markey, members of the Subcommittee. Thank you for giving me the opportunity to testify today. My name is Justin Pidot. As you have heard, I am an Associate Professor at the University Of Denver Sturm College of Law. Prior to joining the faculty I was an appellate lawyer at the U.S. Department of Justice in the Environment Natural Resource Division.

In my testimony today, I will be discussing the importance of environmental litigation brought against Federal agencies and settlements that the United States enters into to resolve such litigation.

Litigation has always been an integral part of enforcing environmental law and administrative Law more generally. Congress created a cause action to challenge agency decisions and the failure of agencies to reach decisions when it enacted the Administrative Procedure Act in 1946. And Congress created more specific citizens provisions in many modern environmental statutes.

The ability of the public to hold Federal agencies accountable has served us well. Environmental litigation is an essential check on the administrative state and holds the executive branch accountable to legislative decisions made by Congress and legal commitments made by agencies embodied in their regulations. Due to the deference afforded to Federal agencies, deference that I enjoyed every day when I was representing the Federal Government at the Department of Justice, environmental litigation is hardly carte blanche for courts, activist or businesses to rewrite agency priorities. Instead such litigation enforces legal obligations.

Some environmental litigation terminates in the settlement or consent decree, as we have heard today, and it is to such situations that I will turn. The majority of environmental settlements arise out of lawsuits in which the Federal Government has essentially has no defense to liability. As a result, in my view, the most significant determinant of whether an environment lawsuit ends in a settlement is a simple one, due to lawyers representing the Federal Government at the Department of Justice believing that the Federal Government can prevail. A similar assessment of legal vulnerability is carried out by litigation attorneys, whether public or private, across the United States.

Environmental settlements provide an array of benefits. First, settlements enhance rather than limit the defending agent's discretion in lawsuits the agency is likely to lose, because they allow the agency to participate in crafting a remedy rather than waiting for a judge to impose a remedy by judicial order.

Second, settlements may save Government resources, particularly if entered into early in litigation. Third, a settlement saves taxpayer dollars by reducing the amount of attorneys' fees the Federal Government has to pay. Fourth, settlements conserve judicial resources.

Moreover, I believe that effective mechanisms already exist to guard against improper settlements. Settlements must be approved

by high-ranking officials of the Department of Justice and this independent review by lawyers of DOJ distance from the mission of a particular environmental agency guards against improper settlements. DOJ also has internal rules that place limitations on the terms that can be contained within settlements. Courts also play a role and have demonstrated their willingness to intervene where appropriate.

I want to briefly respond to two primary criticisms of environmental settlements. First, some argue that settlements allow agencies to evade public debate. In my view this is generally not true. Most settlements involve either commitment by the agency to make a decision or more rarely to use particular procedures in making a decision. These sorts of decisions, where to invest resources, what procedures to use, do not require public participation under general principle of administrative law. In other words, there would be no public participation if the agency simply made those decisions even in the absence of a settlement.

On rare occasions agencies enter settlements that involve a commitment to a substantive position. These decisions either regard primarily matters that will be wrapped into a public decision-making process and properly subject to judicial review, or the exceptional case where settlement makes a final substantive decision the Federal Courts already have ample authority and ample willingness to intervene.

A second argument critics make is that environmental settlements allow environmental groups to set the agenda for Federal agencies. This criticism also fails in my view for the simple reason that it is Congress, not environmental groups, that establish the priorities that are being enforced. Congress has written environmental law to compel agencies to take action. And when agencies fail to take actions so required, litigation from whatever the source, environmental group or industry, simply holds agencies accountable to their statutory mandates.

Environmental settlements make good litigation sense, and they do not empower agencies to evade their legal responsibilities. Criticisms of environmental settlements in my view are simply then criticisms of the underlying substantive environmental statutes. The costs of what some would describe as settlements are really the costs associated with environmental law, not environmental litigation.

There is nothing broken about environmental settlements and there is no legal problem with settlement practices for Congress to fix. If Congress believes that the substance of environmental law needs to be adjusted that is a separate debate and one that should occur forthrightly in full daylight.

Thank you very much.

[The prepared statement of Mr. Pidot follows:]

TESTIMONY OF JUSTIN PIDOT

ASSOCIATE PROFESSOR, UNIVERSITY OF DENVER STURM COLLEGE OF LAW

BEFORE THE SUBCOMMITTEE ON SUPERFUND, WASTE MANAGEMENT, AND REGULATORY OVERSIGHT OF THE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, UNITED STATES SENATE

HEARING ON OVERSIGHT OF LITIGATION AT EPA AND FWS: IMPACTS ON THE U.S. ECONOMY, STATES, LOCAL COMMUNITIES AND THE ENVIRONMENT

AUGUST 4, 2015

Mr. Chairman and Members of the Subcommittee, thank you for giving me the opportunity to testify before the Subcommittee today on environmental litigation and in particular settlements entered into by the government related to such litigation.

I am an associate professor at the University of Denver Sturm College of Law and my primary expertise is environmental law and administrative law. Before joining the faculty at the University of Denver, I was an appellate attorney in the Environment and Natural Resources Division of the U.S. Department of Justice.

In my testimony today, I will begin by discussing the importance of environmental litigation to achieving the goals that Congress has established in federal environmental laws. Litigation has always integral to enforcing environmental law, and administrative law more generally. Congress created a cause of action to challenge agency decisions—and the failure of agencies to make decisions—when it enacted the Administrative Procedure Act in 1946. In many environmental statutes, Congress created more specialized provisions to govern judicial review, which are more suited to particular legal contexts.

The ability of the public to hold federal agencies accountable has served us well. Litigation keeps agencies honest and accountable to the mandates that Congress has established. Environmental litigation itself does not negatively affects the economy, states, or local communities. Litigation merely enforces the legal rules that Congress has established by statute, or implementing agencies have established by regulation. Litigation that holds federal agencies accountable is appropriately encouraged by existing provisions that require the federal government in certain circumstances to pay the legal fees of a party that successfully sues the federal government.

The second portion of my testimony will focus on settlements and consent decrees that the federal government enters into to reach a negotiated resolution to environmental litigation. I will refer to both settlements and consent decree in environmental cases simply as environmental settlements.

All the evidence shows that environmental settlements are a good thing. In all areas of law, settlements dominate the American legal landscape. They are favored by courts, attorneys, and parties because they reduce legal costs and allow the parties, where possible, to negotiate a resolution that eliminates the uncertainty about the outcome of a case and allows the parties, rather than a judge or jury, to find a resolution that all sides can live with.

My comments regarding environmental settlements will proceed in three parts. First, I will discuss the benefits provided by environmental settlements. Second, I will discuss existing mechanisms that ensure that agencies do not enter into settlements that circumvent their legal obligations. And third, I will respond to some criticisms of environmental settlements.

## I. THE IMPORTANT ROLE OF ENVIRONMENTAL LITIGATION

In the 1970s and early 1980s, Congress systematically enacted modern environmental law.[1] Almost every modern environmental laws includes a provision that allows citizens to file lawsuits against either private parties or the federal government for violating the provisions of those laws.[2] Where environmental laws lack specific citizen suit provisions, the administrative procedure act (commonly called the APA) authorizes lawsuits challenging many actions taken by the federal government.[3] It is lawsuits brought against the federal government—either pursuant

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[1] *See* Barton H. Thompson, Jr. *The Continuing Innovation of Citizen Enforcement*, 2000 UNIVERSITY OF ILLINOIS LAW REVIEW, 185 (2000). For a detailed discussion of the history of U.S. environmental law, *see* RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW (2004).

[2] *See generally* Thompson, *supra* note 1.

[3] *See* 5 U.S.C. 704. The APA authorizes judicial review of "final agency action for which there is no adequate remedy in a court." *Id.* Where an environmental statute contains specific judicial review provisions, those provisions will govern rather than the APA.

to the specialized provisions that Congress created in specific environmental statues, or pursuant to the general judicial review provisions of the APA—that are the focus of my testimony today.

Congress's innovations, first in the APA and later through environmental citizen suit provisions, promote important values. First and foremost they hold the executive branch accountable to legislative decisions made by Congress. Environmental citizen suits or APA lawsuits against federal agencies only succeed when those agencies have failed to fulfill the obligations imposed upon them through laws passed by Congress. These provisions are widely used by a diverse array of parties. In a 2011 report, the Government Accountability Office found that EPA faced approximately 150 cases a year. About half of those cases were filed by private companies or trade associations and about 30 percent were filed by either local or national environmental organizations.[4]

Second, citizen suits serve n important democratic values by providing an avenue by which the people can haul government agencies before the courts when those agencies have acted in an unlawful manner.[5] Providing such an avenue enhances fairness by allowing anyone effected by an agency decision, or failure to act, to bring a lawsuit seeking to hold that agency accountable.

Importantly, citizen suits do not authorize citizens or courts to substitute their judgment for the judgment of Congress or federal agencies. To be successful, environmental litigation must be anchored in the legal obligations established through by Congress through legislation or by agencies through regulation. Moreover, the standard of review applied by courts is very deferential to the executive branch. As a former lawyer for the DOJ, I witnessed and benefitted

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[4] U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-11-650, ENVIRONMENTAL LITIGATION: CASES AGAINST EPA AND ASSOCIATED COSTS OVER TIME 13 (2011) (hereinafter "GAO EPA STUDY").
[5] *See* Thompson, *supra* note 1, at 188.

from this deference on a consistent basis. So long as a federal agency has a decent argument that its actions conformed to the will of Congress and also accorded with the regulations established by the agency itself, the federal agencies is very likely to prevail. In other words, while aggrieved parties have many opportunities to sue the federal government to prevail they must overcome a substantial thumb on the scale in favor of the government.

Before I turn to environmental settlements, let me briefly address an additional aspect of environmental litigation. Fee shifting provisions are a crucial tool in facilitating such litigation and evening the playing field. In the absence of such provisions, environmental organizations and concerned citizens would face substantial economic barriers to bringing lawsuits, even in circumstances where the federal government acted in clear violation of the law. Such a situation would cause an imbalance in the legal landscape because private businesses and trade groups, who already file half of lawsuits against EPA, have the financial resources to pay for lawsuits that advance their viewpoint.

Some environmental statutes, like the Endangered Species Act,[6] contain their own fee-shifting provisions. Otherwise, the Equal Access to Justice Act (or EAJA) allows a court to award attorneys fees to the prevailing party so long as the position of the United States is not "substantially justified."[7] While fee-shifting provisions have come under attack in recent years,[8] available information suggests that, overall, attorneys fees in environmental litigation impose a relatively slight burden to the taxpayer. In its 2011 report, the Government Accountability Office study found that between 1995 and 2010, EPA paid approximately $1.8 million a year in attorneys fees,[9] which is just over two hundredths of a percent of EPA's budget. Moreover, fee-

[6] 16 U.S.C. § 1540(g)(4).
[7] 28 U.S.C. § 2412(d)(1)(A).
[8] *See, e.g.*, The Government Litigation Savings Act, H.R. 3037, 113th Congress.
[9] GAO EPA STUDY, *supra* note 4, at 19.

shifting provisions do not create incentives for frivolous litigation. A party only receives a fee award if that party prevails in the litigation, and if the party seeks fees under EAJA they must further demonstrate that the government's position is not "substantially justified."[10]

## II. ENVIRONMENTAL SETTLEMENTS COMPLY WITH THE LAW AND ARE SOUND POLICY

Some environmental lawsuits end in settlements between the federal government and the plaintiff. In recent years, such environmental settlements have been termed the "sue and settle" phenomenon and have generated substantial attention, which was first instigated when the U.S. Chamber of Commerce released a report released criticizing the practice in 2013.[11]

I think the term "sue and settle" is inapt. Settlements virtually always follow the filing of lawsuits, and the vast majority of lawsuits in the American justice system settle—by some estimates, between eighty and ninety-two percent of all cases.[12] Moreover, this is widely viewed as a good thing. Settlements preserve judicial resources and allow the parties to reach an agreement, rather than have a resolution imposed by a judge or jury.[13] Given the frequency of settlements, and the strong public policy favoring settlement, it should come as no surprise that the federal government, like any party in civil litigation, sometimes reaches a settlement. The so-called "sue and settle" phenomenon, then, is simply the ordinary course of litigation in the

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[10] *See* Brian Korpics, et al, *Shifting the Debate: In Defense of the Equal Access to Justice Act*, 43 ENVIRONMENTAL LAW REPORTER 10,985, 10,991 (2013).

[11] *See* WILLIAM L. KOVACS ET AL., U.S. CHAMBER OF COMMERCE, A REPORT ON SUE AND SETTLE: REGULATING BEHIND CLOSED DOORS (2013) (hereinafter "CHAMBER OF COMMERCE REPORT"). Shortly after the Chamber of Commerce released its report, the American Legislative Exchange Council and the Center for Regulatory solutions released their own criticisms of environmental settlements. CENTER FOR REGULATORY SOLUTIONS, SUE-AND-SETTLE: REGULATION WITHOUT REPRESENTATION (2014); WILLIAM YEATMAN, AMERICAN LEGISLATIVE EXCHANGE COUNCIL, THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S ASSAULT ON STATE SOVEREIGNTY (2013) (hereinafter "ALEC REPORT").

[12] *See* Jonathan D. Glater, *Study Finds Settling Is Better Thank Going to Trial*, NEW YORK TIMES, Aug. 7, 2008 (citing the author of an empirical study on settlement for the proposition that "[t]he vast majority of cases do settle – from 80 to 92 percent by some estimates").

[13] *See, e.g.*, In re Deepwater Horizon, 739 F.3d 790, 807 (5th Cir. 2014) (rejecting a rule that "would thwart the 'overriding public interest in favor of settlement' that we have recognized"); Bradley v. Sebelius, 621 F.3d 1330, 1339 (11th Cir. 2010) ("Historically, there is a strong public interest in expeditious resolution of lawsuits through settlement.").

American legal system. As a result, those that seek to curb or cabin settlement opportunities in this single context should have to demonstrate that environmental settlements involve decidedly different considerations than other types of litigation. And, as I will explain, that case has not been made.

Before I turn to the benefits that environmental settlements can secure, let me provide an overview of the typical environmental case that leads to settlement. Unsurprisingly, most environmental settlements fall into a category of litigation that is particularly likely to settle: Circumstances where a defendant has essentially no defense to liability. The circumstance I am referring to is the deadline lawsuit, including deadline lawsuits under the Endangered Species Act and the Clean Air Act, which have stirred some controversy. Of the settlements criticized by the Chamber of Commerce report, more than 80 percent involved deadline lawsuits.[14]

Deadline lawsuits involve the following situation: Congress imposes a strict deadline on certain agency decisions. For example, under the Clean Air Act, EPA has one year to approve a state implementation plan,[15] and under the Endangered Species Act, the Fish and Wildlife Service has one year to render a decision on a petition to list a species under the act if that petition includes substantial information indicating that a listing may be warranted.[16] An agency charged with acting within one of these strict deadlines fails to meet its legal obligations. Someone then files a lawsuit challenging the agency's failure to act.[17]

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[14] *See* Courtney R. McVean & Justin R. Pidot, *Environmental Settlements and Administrative Law*, HARVARD ENVIRONMENTAL LAW REVIEW 192, 217 (2015); Stephen M. Johnson, *Sue and Settle: Demonizing the Environmental Citizen Suit*, 37 SEATTLE UNIVERSITY LAW REVIEW 891, 913 (2014).
[15] *See* 42 U.S.C. § 7410(k)(2).
[16] *See* 16 U.S.C. 1533(3)(B).
[17] *See, e.g.*, 5 U.S.C. § 706(1) (authoring courts to "compel agency action unlawfully withheld or unreasonably delayed"); 16 U.S.C. § 1540(g)(1)(C) (authoring citizen suits under the Endangered Species Act "where there is alleged a failure of the Secretary to perform any act or duty . . . which is not discretionary with the Secretary").

A lawyer for the government in such a situation—where an agency has violated a clear deadline by which the agency must act—has no good defense to liability.[18] When these lawsuits don't settle, the government loses them.[19] A judge will then be in a position to impose on the agency a timeline for the agency to meet its legal obligations. And because the government lacks a substantially justified defense, the government will often be obligated to pay the attorneys fees of the party bringing the lawsuit.[20]

I provide this overview of the legal backdrop to the typical environmental settlement because it highlights how ordinary these settlements truly are. Notwithstanding theories that the federal government is engaging in some form of collusion with plaintiffs,[21] in my view the most significant determinant of whether an environmental lawsuit ends in a settlement is a simple one: Do the lawyers representing the federal government believe that the federal government can prevail? Where those lawyers believe that a loss is virtually inevitable, attempting to settle the case is a no brainer.

### A. Benefits of Environmental Settlements

Environmental settlements offer numerous benefits. First, such settlements enhance—rather than limit—the agency's discretion. In the face of a deadline lawsuit the agency is certain to lose, an agency faces the following choice: Either it can negotiate with the opposing party to establish a mutual agreed upon timeline for the agency's action, or it can wait for judgment and

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[18] *See* McVean & Pidot, *supra* note 14, at 202-03.
[19] *See* Biodiversity Legal Foundation v. Badgley, 309 F.3d 1166 (9th Cir. 2001); Daniel J. Rohlf, *Section 4 of the Endangered Species Act: Top Ten Issues for the Next Thirty Years*, 34 Environmental Law 493, 495 (2004).
[20] *See* 28 U.S.C. § 2412(d)(1)(A).
[21] *See* Chamber of Commerce Report, *supra* note 11, at 3. The Chamber of Commerce Report implies that evidence of such collusion can be found in the fact that in some circumstances a settlement or consent decree is filed alongside the complaint initiating suit against the agency. *See id.* at 11. This is, however, entirely unsurprising because environmental citizen suit provisions require a party intending to file a lawsuit to provide notice of that lawsuit sixty days before filing. *See* Johnson, *supra* note 14, at 912. In other words, by the time the complaint is filed, the federal government has been on notice of the impending lawsuit for two months and negotiations can occur during that period.

have a judge impose such a deadline.[22] The agency maintains more control over its agenda by entering into settlement negotiations, rather than allowing a judge to enter an injunction compelling the agency to act within a certain timeframe. This rule—that agencies increase their discretion by settling, rather than litigation—holds true in most cases where an agency is likely to lose. Agencies simply have more control over the terms of settlements than over the terms of a judge's order.

Second, settlements save government resources. These resources largely take the form of staff time at both the Department of Justice, which represents environmental agencies in federal court, and the agency being sued.[23] This savings will be particularly significant where a settlement can be reached early in the life of a lawsuit, and in appropriate circumstances, settlement negotiations can begin even before the filing of a complaint because parties suing the federal government under most environmental statutes must provide notice of their intent to file a lawsuit sixty days before filing their complaint.[24]

Third, settlements save taxpayer dollars by reducing the amount of attorneys fees the federal government has to pay. This savings occurs because, just as settlements reduce the amount of time required by government attorneys, they also reduce the amount of time required by plaintiffs' attorneys. The fewer hours plaintiffs' attorneys spend on a case, the lower the amount of attorneys fees they can demand.

Fourth, settlements conserve judicial resources by resolving cases without a judge having to rule on liability and craft a remedy. This frees judges to spend time on more controversial matters.

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[22] *See* McVean & Pidot, *supra* note 14, at 231-32.
[23] *See* Johnson, *supra* note 14, at 934.
[24] 42 U.S.C. § 7604(b) (Clean Air Act sixty day notice requirement); 16 U.S.C. § 1540 (g)(2)(C) (Endangered Species Act sixty day notice requirement); 33 U.S.C. § 1365(b) (Clean Water Act sixty day notice requirement).

### B. LIMITATIONS ON ENVIRONMENTAL SETTLEMENTS

In reaching environmental settlements, the government secures the benefits I have discussed, but it does not have carte blanche to do so. There are three sources of safeguards that apply to environmental settlements that I will discuss, and to my mind, these safeguards address any concern that settlements could be used to circumvent agency procedural obligations.

First, agencies do not themselves possess authority to enter into a settlement. Rather, only appointed and confirmed officials within the Department of Justice can approve a settlement.[25] This independent review by lawyers charged with representing the United States limits an agency's ability to enter into settlements. An agency has to not want to enter a settlement, but the agency has to convince lawyers at the Department of Justice that settlement is both appropriate and desirable. Because Department of Justice lawyers will not be driven by the agency's mission, but rather by legal considerations, vesting settlement authority at the Department of Justice significantly limits agencies ability to enter into collusive settlements.

Second, the Department of Justice has internal rules that place limitations on the terms that can be contained within settlements. A 1999 memorandum produced by Randolph D. Moss, the Acting Assistant Attorney General overseeing the Office of Legal Counsel, currently guides settlement policy, and that memorandum acknowledges that the Administrative Procedure Act, and other limits on agency decisionmaking processes, limits the Department of Justice's authority to enter into settlements that would appear to circumvent "restrictions on the manner in which the executive branch may adopt and revise regulatory rules and procedures."[26]

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[25] *See* 28 C.F.R. § 0.160(d); *see also* McVean & Pidot, *supra* note 14, at 202. Settlements must either be approved by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or an Assistant Attorney General. All of these positions are subject to Senate confirmation.

[26] Memorandum from Randolph D. Moss, Acting Assistant Attorney Gen., Office of Legal Counsel, to Raymond C. Fischer, Assoc. Attorney Gen., 23 OPINIONS OF THE OFFICE OF LEGAL COUNSEL 126, 128 (June 15, 1999); *see also* McVean & Pidot, *supra* note 14, at 208.

Third, courts must approve and enforce settlements, and courts have demonstrated their willingness to intervene when a settlement oversteps legal bounds. Judicial intervention can take two forms. First, a court can simply refuse to approve a settlement. For example, in *Conservation Northwest v. Sherman*, the Ninth Circuit refused to allow a consent decree that the Court found substantively modified the terms of a Forest Plan.[27] Such modification, the Court reasoned, required the agency to proceed through the ordinary administrative process for Forest Plan amendments. Second, after a settlement has been entered, a later court can vacate the settlement in litigation challenging the settlements terms. For example, in *Minard Run Oil Co. v. U.S. Forest Service*, the Third Circuit vacated a settlement under which the Forest Service had agreed to perform environmental review before allowing certain activities within a national forest.[28] The court again found that the decision to perform such review, which departed significantly from past practices, needed to be made through a notice-and-comment rulemaking.

### C. Misplaced Criticism of Environmental Settlements

Environmental settlements provide significant benefits and there already exist numerous safeguards to prevent agencies from misusing this litigation device. Nonetheless, some argue for new and aggressive limits on the government's ability to enter environmental settlements. Such limits will surely increase the cost to taxpayers because they will prolong litigation and result in higher fee awards. Moreover, I believe the concerns are misplaced. I'd like to explain why the two most common arguments against environmental settlements are not cause for concern.

First, the most potentially significant argument against environmental settlements, to my mind, is the claim that such settlements allow agencies to make decisions in secret without soliciting public input. If environmental settlements truly allowed circumvention of

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[27] Conservation Northwest v. Sherman, 715 F.3d 1181 (9th Cir. 2013).
[28] Minard Run Oil Co. v. U.S. Forest Serv., 670 F.3d 236 (3d Cir. 2011).

administrative law, this would be a concern. However, as I will explain, environmental settlements involve decisions that would not be subject to public participation even if the decision was made outside of a settlement.[29] And where agencies do make decisions in environmental settlements that evade requirements for public participation, courts can, and do, intervene.[30]

The vast majority of environmental settlements involve decisions that agencies may freely make without engaging in any public process.[31] As I've discussed, most environmental settlements resolve deadline litigation, and through the settlement, the agency commits to making a decision—one that Congress has already mandated that the agency make. Such settlements involve an agency making a decision to allocate resources to complete a specified decisionmaking process. Agency decisions to allocate resources and set priorities do not require public participation. Indeed, courts refer to resource allocation decisions as a quintessential matter of agency discretion.[32] As a result, an agency making such a decision through a settlement evades no public participation requirement.

The same is true for other, rarer categories of settlements. On occasion, agencies enter settlements that commit to engaging in particular procedures in making a decision.[33] For example, in *California Resource Agency v. U.S. Department of Agriculture*, a state agency and environmental groups filed a lawsuit alleging that the Forest Service had violated its procedural obligations in finalizing a forest plan.[34] After the district court ruled that the Forest Service had

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[29] *See* McVean & Pidot, *supra* note 14, at 230-38.
[30] *See id.* at 236.
[31] *See id.* at 230-33.
[32] *See, e.g.*, Oil, Chemical & Atomic Workers Union v. Occupational Safety & Health Administration, 145 F.3d 120, 123 (3d Cir. 1998).
[33] *See* McVean & Pidot, *supra* note 14, at 233-35.
[34] California Resources Agency v. U.S. Department of Agriculture, Nos. 08-1185, 08-3884, 2009 W.L. 6006102 (N.D. Cal. Sept. 29, 2009).

violated the law, the federal government entered into a settlement with the plaintiffs agreeing to engage in certain procedures. To be clear, the Forest Service could always have made the decision, without any public input whatsoever, to engage in those procedures. The APA explicitly exempts rules of agency procedure from public participation requirements,[35] and such procedural decisions are generally a preliminary aspect to an agency's decisionmaking process that is not independently subject to judicial review.[36] Moreover, as the *Minard Run* case demonstrates,[37] where an agency makes a procedural rule that a court believes should have been subjected to notice-and-comment rulemaking procedures, courts have ample authority to override the terms of the settlement.

Finally, agencies occasionally enter settlements that involve a commitment to a substantive position.[38] Often, these commitments regard preliminary matters that will become part of an agency decision subject to notice and comment rulemaking and eventually judicial review. In such a case, a reviewing court would consider the propriety and legality of the settlement at the time that the agency reaches a final decision.[39] In rare situations an agency may attempt to enter a settlement that makes a final substantive decision that will not become part of another decisionmaking process.[40] Where such substantive decisions require public participation, the *Conservation Northwest* court demonstrates that courts are already well-equipped to detect and address the problem.

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[35] 5 U.S.C. § 553(b)(A).
[36] *See, e.g.*, 5 U.S.C. 704 (authorizing judicial review of "final agency action").
[37] Minard Run Oil Co. v. U.S. Forest Serv., 670 F.3d 236 (3d Cir. 2011).
[38] *See* McVean & Pidot, *supra* note 14, at 235-38.
[39] The multi-species settlements between the Fish and Wildlife Service and the Center for Biological Diversity and Wildearth Guardians contained such a commitment. In those settlements, the agency agreed not to conclude that a listing of the species at issue was warranted by precluded by other priorities. *See* James J. Tutchton, *Getting Species on Board the Ark One Lawsuit at a Time: How the Failure to List Deserving Species Has Undercut the Effectiveness of the Endangered Species Act*, 20 ANIMAL LAW 401 426
[40] *See* McVean & Pidot, *supra* note 14, at 238.

Because most settlements do not evade any public participation requirement and because courts already have ample authority to intervene in the rare circumstance where such evasion occurs, this critique of environmental settlements is unfounded.

A second argument critics make is that environmental settlements allow environmental groups to set the agenda for federal agencies.[41] This criticism also fails for the simple reason that it is Congress, not environmental groups, that have established the priorities that are being enforced. Congress has written environmental law to compel agencies to take action, and when agencies fail to take actions so required, litigation—from whatever the source—simply holds agencies accountable to their statutory mandates.

## CONCLUSION

Environmental settlements make good litigation sense. They make good policy sense. And they do not empower agencies to evade their legal responsibilities. Criticisms of environmental settlements, in my view, are simply criticism of the underlying substantive environmental statutes. Complaints about the Fish and Wildlife Service's settlement of deadline litigation about listing endangered species are not at core complaints about the settlement, but rather, complaints by certain interest groups who object to a particular species being listed, even if the scientific evidence demonstrates that a listing is warranted. Similarly, complaints about the EPA's settlement of Clean Air Act litigation are not at core complaints about the settlements, but rather, complaints that certain interest groups object to aspects of the Clean Air Act.

In other words, there is nothing broken about environmental settlements. There is no problem with settlement practices for Congress to fix. There is not record to substantiate claims that they are collusive. There is no record to substantiate claims that they enable agencies to

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[41] *See* ALEC REPORT, *supra* note 11, at 5.

avoid public participation. There is no record to substantiate claims that they enable private parties—environmental groups or industrial groups—to take over agencies.

The Department of Justice and the federal environmental agencies should retain discretion to settle litigation brought against the federal government, in just the way that any other party in civil litigation can settle a case if settlement is a better option that litigation. If Congress believes that the substance of environmental law needs to be adjusted, that is a debate that should occur in full daylight. Environmental litigation and environmental settlements should not be used as an underhanded attempt to remake the substance of environmental law.

Senator ROUNDS. Thank you for you testimony, Mr. Pidot.

Senators will now each have 5 minutes for questioning. I will begin.

Ms. Sgamma, in your testimony, as of October 2014, there have been 88 sue-and-settle cases arising under the Clean Air Act and 43 lawsuits challenging Fish and Wildlife Service decisions. Some of these suits are brought by States and industry groups. You point out that settlements shut out stakeholders and that there are few other options for substantive participation in the process.

Do you believe that States and industry groups are resorting to lawsuits because their participation and comments are being shut out by both normal rule processes and by lawsuits?

Ms. SGAMMA. We certainly comment on many, many different regulatory proceedings every year and often feel that our comments are pretty much ignored. So in some case we have been more litigious in the last few years just to defend ourselves.

If you look at the NSPS requirements that were finalized in 2012 that were the result of an environmental lawsuit, really the rules resulting went far beyond what is required in an 8-year review and went into rushing in very complex regulations on a very strict deadline that did not give the agency the chance to do real deliberative rulemaking. And that has spun several lawsuits and several administrative petitions.

Senator ROUNDS. Thank you.

Mr. Baker, your testimony focuses on the lack of State involvement and promulgating regulations that stem from lawsuits. Can you explain to us the collaborative making process the EPA previously engaged in with States when promulgating regulations and the quality and feasibility of the regulations coming out of that process, compared to the process that has developed in recent years and the quality of these new regulations?

Mr. BAKER. A good example would be the New Source Performance Standards that were promulgated in the 1990s and 2000s. The rule, before it was even promulgated, put in the Register, we had an idea they were coming. We saw the writing on the wall that this particular industry, whatever it was, was going to be subject to a potential new rule. So we started looking at our individual facilities, their emissions; we tried to identify which ones would be affected. Then we started early outreach to those individual companies in Mississippi.

Then as the proposed rule was posted on the register we began the comment period along with the private sector. There was stakeholder interaction. We felt that the EPA listened to not just to our comments on implementation of the rule but also the impacts to the environment and to the companies being regulated.

At the end of the day we felt the controls that were in place minimized the disruptiveness of the operations and took into account costs. The timing was such that it was sometimes over a matter of years in the making and at the end of the day we felt that we were equipped and ready to implement the rule timely.

Mississippi DEQ has a desire to be in compliance. We do not want to circumvent rule. We have seen the pace at which regulations are effecting Mississippi companies seem to be accelerated and our ability to comment to EPA seems to have been responded

to with, just wait for the final rule, you will see what we will take into account. Sometimes we do not get the sense that EPA is listening to our concerns as in the past.

But I think that the process up to this point has seen real gains in pollution control and we are proud in Mississippi to have relatively clean air. I am concerned that this approach is going to embolden advocacies that are not exactly healthy for Mississippi.

Senator ROUNDS. Thank you. Senator Markey.

Senator MARKEY. Thank you, Mr. Chairman, very much. Mr. Pidot, in 2011 the Fish and Wildlife Service settled litigation involving multiple cases that were consolidated together and involved the backlog of 250 species listing determinations under the Endangered Species Act. Isn't it true that the settlement merely required the Fish and Wildlife Service to make final decisions by a certain date as to whether or not the candidate species warranted listing?

Mr. PIDOT. Yes, Senator, that is true and indeed in a number of cases the Fish and Wildlife Service has decided that listing a species is not warranted under the settlement, and so the settlement did not compel the agency to list species.

Senator MARKEY. Have any courts had the opportunity to consider whether the settlement agreement was an overreach of the agency authority and if so what was the result?

Mr. PIDOT. The consent decrees were entered so there would have been public interest review at the time the consent decree was entered by the MDL court. I do not know of any subsequent judicial review, although every decision the Fish and Wildlife Service makes to list or not list a species would be subject to judicial review or a party to seek and search review.

Senator MARKEY. Are there any, Mr. Pidot, meaningful distinctions between the types of settlements agreements that typically involve litigation between industry and the agency and the types of settlement agreements that typically involve litigation between environmental groups and the agencies?

Mr. PIDOT. I think likely not on the defensive side. There is another class of settlements that are not really focused on at the moment which are settlements of enforcement cases where EPA or another Federal agency would be pursuing industry for violation of the law and there are another set of considerations that might arise in enforcement settlement. Although to my mind both are fully compliant with the rule of law.

Senator MARKEY. Could you share an example of when a proposed settlement agreement was not approved by Department of Justice guidance required or when the court rejected a proposed settlement because it overreached?

Mr. PIDOT. I can offer an example of the latter. I do not have an example off-hand of the former when DOJ deliberations on individual settlements or subject to either to decline privilege generally held relatively close. But a good example of a court intervening would be the Conservation Northwest litigation in the Ninth Circuit under which a settlement consent decree was proposed that would have substantively modified the species being monitored under a forest plan to monitor the health of the forest. The Ninth Circuit said that such a modification of the forest plan would need to go through notice and comment rulemaking and therefore it was

an abusive discretion for the District Court Judge to enter the consent decree.

Senator MARKEY. Mr. Gomez, during your investigation of the EPA settlements and the Clean Air Act litigation did you see evidence that EPA agreed to do anything other than just set a new deadline? Did anyone submit public comments about the proposed settlements saying that the settlement was inappropriate?

Mr. GOMEZ. In our review of the nine rules that resulted in settlement agreements, none of those settlement agreements dealt with anything that was changing the substance or nature of the rule. They were all essentially setting new schedules or interim deadlines. I am sorry, can you repeat your second question?

Senator MARKEY. Public comments?

Mr. GOMEZ. So not only did we review the content of the settlement agreements we also reviewed all of the public comments that were received for all of the settlement agreements.

Senator MARKEY. So in essence they were just saying get your job done, set deadlines, get to work, get finished, right?

Mr. GOMEZ. In the ones that we reviewed, yes.

Senator MARKEY. Thank you. Mr. Gomez, critics of citizen suits argue that allowing attorney's fees and other cost to be recovered by the prevailing party is a way for litigants to profit. Can you tell us what limits there are on how fees can be recovered?

Mr. GOMEZ. Sure. The Department of Justice is responsible for overseeing those payments, those payments in terms of the amounts of payment and where the payments come from, whether they come from the judgment fund or the agencies are based on the environmental statutes. The Department of Justice does review for example and is in negotiations with the plaintiffs in terms of how much it is going to reimburse. Department of Justice reviews, for example, the submissions of information in terms of attorney hours, the types of work that is being submitted.

Senator MARKEY. So fees and cost are not awarded if the agency was substantially justified in the action it had taken?

Mr. GOMEZ. I am sorry, can you repeat that?

Senator MARKEY. Are fees and costs allowed if the agency is determined to have been substantially justified in the action it had taken? Or not taken?

Mr. GOMEZ. Yes, that is correct.

Senator MARKEY. Thank you, Mr. Chairman.

Senator ROUNDS. Senator Inhofe.

Senator INHOFE. Thank you, Mr. Chairman. Later today, we are going to release the EPW oversight report detailing the problems surrounding sue-and-settlement. There are already so many legal questions over the rules that I think it is going to be subjected to a lot of lawsuits. I get the impression that the EPA does not really care about that because the damage is already done.

Mr. Grossman, what damage is done even if these rules are overturned so far?

Mr. GROSSMAN. Thank you, Senator. In litigation, not in my personal capacity as I am testifying here today, I represent the great State of Oklahoma. I can tell you the State of Oklahoma has spent an enormous amount of money and manpower and bureaucratic resources to figure out what it needs to do to comply with these rules

and how it can keep the power on in the State and maintain electric affordability. It had to do this during the proposal phase of these rules, because the cuts they require are so aggressive and they are so disruptive to the electric system of the State, as is the case in many other States.

At this point, States and utilities are making decisions that are irreversible in terms of investments and retirements. These are the costs and all of these costs are being borne before any substituent litigation over the rules.

Senator INHOFE. Our Attorney General has been very active in working with you and you have one done a great job helping us. Is this kind of a typical outcome of a sue-and-settle case, that at EPA, they really do not care too much about what happens today the damage is already done?

Mr. GROSSMAN. I think that is right. I think that is right in a very specific sense. When an agency is engaging this kind of legal chicanery there is usually some reason for it. There is a reason that the environmentalist groups bring these suits and there is a reason that the agencies are happy to work with them and collude in settlements and other activities. And the reason is that it works.

Senator INHOFE. I am not a lawyer, but it seems to me that this would strength the arguments for impacted parties' request for a judicial stay. Would you agree with that?

Mr. GROSSMAN. I would entirely.

Senator INHOFE. Ms. Sgamma, you made the comment how you could really quantify the damage that is done by all of these regulations and it took me about a year and the Obama administration to realize that there is more and more and more coming, more damage that is coming.

In fact, for the first time the agricultural groups have made the statement that there really is not anything in the Ag Bill that affects them, it is over-regulation of the EPA. How have environmental activists used sue-and-settle to hijack the listing process over the policy priorities of Fish and Wildlife?

Ms. SGAMMA. I think a good case in point is the Wild Earth Guardian suit which was 251 species that were on the candidate list. Now, there were hundreds of other ones that the Center for Biological Diversity settled on as well. But those specific to the candidate species list were absolutely setting the priorities of Fish and Wildlife Service. Because they have the option of putting less high priority cases on the candidate list, and here they were being forced to completely put those priorities aside and make decisions on those species list. Resources are diverted away from species that are truly endangered to those that are less high priority.

Senator INHOFE. Yes, I understand that. Mr. Baker, do you believe that the current public comment process for the Clean Air Act settlement agreements provides the States a meaningful opportunity to participate in settlement agreements? You have heard us make the comment about who is involved in these settlement agreements. What do you think about that?

Mr. BAKER. We were aware there was a lawsuit in the $SO_2$ data requirements rule example. But we were aware of the settlement in 18 days after the settlement occurred by letter. So, no, we were not afforded a chance to comment, to provide even any input.

Senator INHOFE. Yes, that certainly is the case in Oklahoma. They are kind of left out.

Mr. Chairman, my time has expired and as I have mentioned at the very beginning, simultaneously we have SASC Armed Services here during this and I have to go over to that. I appreciate very much the response to the questions and the testimony you have given. Thank you.

Senator ROUNDS. Thank you. Senator Boozman.

Senator INHOFE. I am sorry, Senator Boozman. I ask consent for my opening statement to be part of the record.

Senator ROUNDS. Without objection.

[The prepared statement of Senator Inhofe follows:]

STATEMENT OF HON. JAMES M. INHOFE,
U.S. SENATOR FROM THE STATE OF OKLAHOMA

Thank you, Subcommittee Chairman Rounds, for convening today's oversight hearing, and thank you to our witnesses for being here to testify. Today's hearing is very timely given the President's finalized carbon mandates released just yesterday. These rules are truly the poster child for what is wrong with "sue-and-settle" tactics under the Obama administration.

In this case, the U.S. Environmental Protection Agency (EPA) and far-left environmental activists entered into a settlement agreement to issue unprecedented carbon cutting regulations for power plants by an unrealistic deadline. As with most "sue-and-settle" scenarios, EPA rushed the rules, based on shaky legal grounds and poor economic analysis, while circumventing important interagency review that is only meant to strengthen the quality of regulations.

Indeed, the rules were not the result of a well thought out stakeholder driven and open regulatory process. Instead, they were years in the making behind closed doors, and after years of regulatory uncertainty and critical investment decisions by States and affected entities, it is likely a court will strike the rules. Yet, it appears the Obama EPA does not care about the final outcome of the rules as the years of potential litigation will only further distance current senior officials from responsibility for the devastating impacts of these rules. Showcasing this mentality, in response to the recent Supreme Court decision on EPA's mercury rule, current EPA Administrator Gina McCarthy shrugged off concerns over a court potentially vacating the rule because the investments were already made; essentially the damage has been done.

This "sue-and-settle" to regulate now and litigate the merits later strategy is why "sue-and-settle" is counter to administrative law and principles for government transparency. When the Federal Government enters into a settlement agreement that binds the agency to future action, it should take place in the sunshine, not behind closed doors. However, the testimony we will hear today highlights how "sue-and-settle" undermines the public interest, by allowing special interests to set an agency's agenda while excluding States and other interested parties from the process. Limiting key stakeholders from the process to a cursory public comment period—after a settlement has already been reached—is too late in the process and does not afford those tasked with implementing the resulting regulations to fully analyze a proposal and plan accordingly.

Testimony today will also shed light on "sue-and-settle" tactics used at the U.S. Fish and Wildlife Service (FWS) that similarly bind the Service to make Endangered Species Act (ESA) listings based on questionable science and rushed review. In these cases, special interests appear to target species that lock up areas for important development and job creation, rather than species that may have been most in need of potential protection under ESA.

Above all, whether at EPA or FWS, a theme that will stand out from today's testimony is that the Obama administration has not been forthright with the American people in its regulatory plans. An open and transparent regulatory process that provides the opportunity for stakeholder and public participation can only result in better, more effective, and legally sound rulemaking decisions. Instead, the current regulatory regime employed by the Obama administration through "sue-and-settle" appears to only result in legally shaky rules that incentivize further litigation, expend more taxpayer dollars and agency resources, and ultimately stall meaningful environmental and public health benefits.

I ask that my full statement be entered into the record. Thank you.

Senator BOOZMAN. Mr. Gomez, you mentioned that your statistics come from 2010, is that right?

Mr. GOMEZ. Sir, the statistics in terms of the number of cases were for a 16-year period ending in 2010.

Senator BOOZMAN. Why are we not ending to 2014?

Mr. GOMEZ. I am sorry, in terms of the number of cases filed up to 2014 we do not have that information. That information was from a report that we issued a few years ago.

Senator BOOZMAN. So we are like how many years behind?

Mr. GOMEZ. So the statistics on 2,500 cases that were filed were for a 16-year period ending in 2010 so that was, I believe, from 1995 to 2010.

Senator BOOZMAN. I guess my point is it would be helpful to have somewhat current information, and I do not think that is current at all.

Mr. GOMEZ. We do not have information since then in terms of the number of cases.

Senator BOOZMAN. I do not mean to belabor it, but is there a way of finding out?

Mr. GOMEZ. What happened to us when we were doing that work is there is no aggregated data that the agencies had. For example, there were four different data sets that we looked at. Department of Justice had two of them, Department of Treasury had one and EPA had another. We had to sort of pull the information together and from that information we were able to identify who the plaintiffs were and also what statute they were suing under. That was about the extent of the information.

Senator BOOZMAN. In your testimony you stated that the information regarding lawsuits against the FWS is limited. Does GAO recommend that FWS provide more information about information regarding lawsuits against them?

Mr. GOMEZ. That is really a good question. When we also did that report on Fish and Wildlife, there was not a lot of information. The agency was not collecting that information. However, because of congressional direction, now EPA and the Department of Interior have been providing information on attorney costs and fees as part of their budget justification. They started doing that in fiscal year 2014, but it goes back to 2011.

There is now information that you can review on what EPA and the Department of Interior is submitting in terms of attorney fees and cost.

Senator BOOZMAN. I know EPA started posting notices to sue on its Web site in 2013. Does FWS post notices of intent to sue?

Mr. GOMEZ. That is a good question. I do not know the answer to that. I will have to get back to you on that one.

Senator BOOZMAN. Thank you.

Ms. Sgamma, again, in your testimony and during the course of the discussion, you have expressed support for limiting the ability of litigants to sue and settle behind closed doors without the involvement of the State. So actually you are in a position to having to do these things for States and local officials. You also mention limiting provisions that put the taxpayers on the hook for the cost the frivolous lawsuits. Can you again explain why that is so very, very important?

Ms. SGAMMA. Well, I think when you have the Administration pandering to one special interest and then it turns around and reimburses that special interest for setting and expending State and Federal resources, it seems like a poor use of taxpayer money. Especially when much of what they are trying to do is stop job creating projects or they are taking resources out of the economy with very expensive environmental regulation, that does not seem like a good use of taxpayer funds.

Senator BOOZMAN. Mr. Grossman, what else can we do to make sure the Government is making a good faith effort to defend against these frivolous lawsuits and stand up for the taxpayers?

Mr. GROSSMAN. Thank you, Senator. I think the answer is twofold and this is really reflected in the Sunshine Legislation that has been proposed. One is for courts to enforce a public interest standard and the second is for affected parties to be able to intervene and participate in the settlement negotiations to the extent that is viable, as well as in the approval process so that everything is out in the open, to the extent the agency is committing itself to do anything that is really considered in the broader context of the agency's mission.

Senator BOOZMAN. Good.

Mr. Pidot, do you disagree with that, do you think these things ought to be out in the open as was suggested?

Mr. PIDOT. I think in general, litigation decisions are vested in the Department of Justice for a reason and that I respect.

Senator BOOZMAN. So what is the reason the public and Congress and everybody else should not know?

Mr. PIDOT. I think the reason, as I suggested in my testimony, in my view most of these cases are dead losers for the Government. The public interest in such a circumstance is resolving the cases as quickly as possible with the agency having the maximum ability to maintain its discretion in the face of an impending loss.

So dragging out litigation is simply going to increase the cost to the taxpayer through attorney's fees, it is going to increase the cost to the Department of Justice. And the end result, if a settlement is not accomplished, you will have judges all across the country in hundreds of cases imposing conflicting injunctions against the Federal Government in a way that is much less organized and feasible than in a settlement.

Senator BOOZMAN. On the other hand, I think Ms. Sgamma and Mr. Baker would feel like in many of the settlements you simply could not have gotten a worse deal. Thank you, Mr. Chairman.

Senator ROUNDS. Thank you. Senator Sullivan.

Senator SULLIVAN. Thank you, Mr. Chairman, and I appreciate the witnesses' testimony today, and these are really important issues and I think they are not always well understood.

Let me give you kind of sense of a bit of frustration on some things. I was Attorney General in the State of Alaska, and undertook a number of lawsuits against Federal agencies like the EPA when they were acting in a way that I thought was inconsistent with the law.

I actually think that agency acts inconsistently with the law on a very regular basis. It is not just me who thinks that. The Supreme Court in the last two terms that it had, the Michigan case

just came down and then the Utility Air Regulators case. Those are both examples where the highest court in the land said, you are either violating the Constitution, you are either violating the statute or you are either violating both.

The trouble is that when you undertake lawsuits like that, they challenge EPA's authority, rogue agency action, which I believe they are doing. This WOTUS Rule of the U.S. regulation is another classic example. They are clearly trying to rewrite the Clean Water Act, they are clearly trying to expand their jurisdiction. I think there are 30 States that are now suing them. I think they are going to win.

We are going to try and stop that because, and it is Democrats and Republicans, by the way, in this Congress who believe they are violating the law with regards to the waters of the U.S.

But here is the challenge. You challenge these actions, they do not listen. The Administrator comes and feeds a line of whatever, says they are abiding by the law. The Supreme Court eventually says, no, you are not. I am sure that will happen with the WOTUS Rule as well.

But they go ahead and do it anyway and it takes years to litigate. By the end of the day, even though you went into the Supreme Court in some ways you are already checkmated by a rogue agency that violates the law. The private sector has to abide by what they have said anyways because litigation took 6 years to get to the Supreme Court. How do we try and defend against that? Because I think that is part of their strategy.

Knowing that litigation takes 5 years, companies do not have 5 years or citizens do not have 5 years by which to just forget it if I am not going to abide by the regs until the Supreme Court rules. What is the approach we can take that prevents this kind of checkmate action even though they are losing term after term in the United States Supreme Court?

Anyone thought on that? Because I think it is really an important issue and really is a vice that these agencies that act without legislative authority, ignore the Congress, ignore the statute but still the American citizens have to abide by what they are saying. By the time the Supreme Court rules against them it is too late. Any thoughts on that?

Mr. GOMEZ. Yes, sir, if I could. First of all, I agree with your remarks and your observations. I think this has been a hallmark of some of the more expensive regulatory actions of this Administration's EPA. To a certain extent, a reasonable administration, one that was concerned with the lawfulness and legality of its actions, would be less aggressive in terms of trying to carry them out by fiat and a little bit more concerned about the legal niceties of following the law.

Senator SULLIVAN. They are not niceties, they are actually requirements.

Mr. GOMEZ. Right. Making sure that its actions are legally durable, that they will be upheld in the end and thereby not impose unnecessary costs on regulated parties. For Congress, one thing to think about may be potentially the availability of additional relief or a lower standard to obtain an injunctive relief for injunctions against certain types of major rules recognizing that a particular

area such as under the Clean Air Act and otherwise there have been problems in that regard.

So maybe it is more reasonable for courts, given the legal uncertainties in that area, to be a little bit less deferential to the agencies saying, this is very expensive, it is very legally complex. Let's just hold on a minute while we evaluate the legal merits.

Senator SULLIVAN. Thank you, but do you think we can take action like that in terms of a law that mandates that? Because again, right now, they lose but they win.

Mr. GOMEZ. Yes, Senator, I think setting standards at the goal particular cause of actions something that Congress has done for over 100 years.

Senator SULLIVAN. Thank you. Mr. Chairman I have one more final question. I know I have run out of time.

Senator ROUNDS. Quickly.

Senator SULLIVAN. Thank you. I just had another question relating to the citizen suits and the special standings status of certain NGOs, whether it is under the Endangered Species Act or Clean Air Act, groups such as the Center for Biological Diversity. My understanding, and I really just need your thoughts on this, is that they have kind of a special standing status, they get public interest to do a kind of designation.

I guarantee you that in my State of Alaska, these groups are not considered to carry out the public interest. They are viewed oftentimes as going against the public interest.

This is not a partisan issue. In my State, any time there is a responsible resource development activity, most Democrats, Republicans, the vast majority of the citizens of my State desire these groups come in from the outside and sue to stop it. It is constant. It happens all the time. That is why we cannot build roads in Alaska.

Senator ROUNDS. Sir, I am going to have to ask you to get to your question.

Senator SULLIVAN. Sorry. So the question is, what is the status in the Federal law and do you think it actually represents public interest? Should other entities such as citizens who aren't NGOs, businesses who live in the States also have special standing ability? Or should these groups be given special treatment under the Federal Law when, at least in the example of Alaska they certainly do not represent the public interest?

Mr. GOMEZ. Senator, if I may, I think your question raises a broader point about how it is that the Government comes to recognize and carry out what the public interest is. Think about how bizarre it is that we have a Congress that is the representative body of the people, we have executive agencies that are accountable to the President nominally, and yet we are relying on litigation by just random private parties who think they know what is best to go and sue agencies and say, we want you to do this before that.

It is a very strange way to do things. I think it is perfectly appropriate for Congress to consider rather that is the best way for agencies to organize their priories and determine what in fact is the most pressing public interest.

Senator ROUNDS. With that I want to thank all the members of this panel for taking your time to come in and participate with us.

We most certainly appreciate your input into this process. You have taken time away from everything else to come in and be a part of today.

I also want to take this time to thank our Senator Markey, our Ranking Member and all of our other colleagues who attended this hearing. The record for this hearing will be open for 2 weeks which brings us to Tuesday, August 18.

With that, once again, thank you for your time and participation. This hearing is adjourned.

[Whereupon, at 10:40 a.m., the hearing was adjourned.]

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